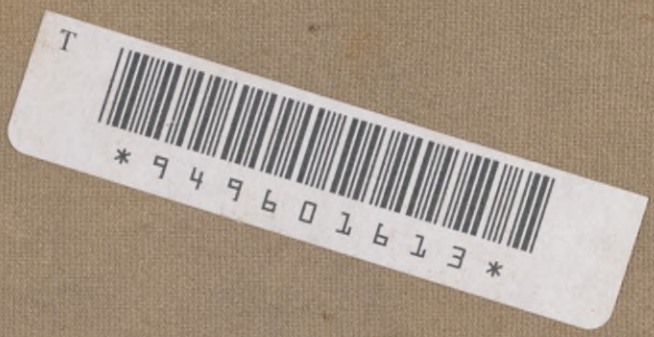

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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1838.

By RICHARD PETERS,

COUNSELLOR AT LAW, AND REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

VOL. XII.

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EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. ROGER B. TANEY, Chief Justice.

" JOSEPH STORY,
" SMITH THOMPSON,
" JOHN McLEAN,
" HENRY BALDWIN,
" JAMES M. WAYNE,
" PHILIP P. BARBOUR,
" JOHN CATRON.
" JOHN McKINLEY,

} Associate Justices.

BENJAMIN F. BUTLER, Esq., Attorney-General.

WILLIAM T. CARROLL, Clerk.

RICHARD PETERS, Reporter.

ALEXANDER HUNTER, Marshal.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

XLV. In all cases, where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

XLVI. In all cases of affirmances of any judgment or decree in this court, costs shall be allowed to the defendant in error, or appellee, as the case may be, unless otherwise ordered by the court.

XLVII. In all cases of reversals of any judgment or decree in this court, except where the reversal shall be for want of jurisdiction, costs shall be allowed in this court for the plaintiff in error, or appellant, as the case may be, unless otherwise ordered by the court.

XLVIII. Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases, no costs shall be allowed in this court, for or against the United States.

XLIX. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice appertain.

L. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process sent to the court below, and annex to the same the bill of items, taxed in detail.

LI. All motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

LII. The court will, at every future session, announce on what day it will adjourn, at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1838.

UNITED STATES, Plaintiffs in error, *v.* ANDREW N. LAUB.

Secondary evidence.

The United States instituted an action on a treasury transcript of the accounts on the defendant, who had been a clerk in the treasury department, and as such, and as agent under the authority of the secretary of the treasury, had disbursed public moneys under several heads of appropriation; some, specific and temporary, others, of a more permanent and general character. On the night of the 30th of March 1833, the treasury building was consumed by fire, which destroyed all his books, papers and vouchers, relating to the disbursements made by him. During the period in which the defendant had performed the duties of agent, he had settled his accounts with punctuality, and to the satisfaction of the accounting officers; all suspicion of fraudulent missapplication of the money was disclaimed by the counsel of the United States, in the argument of the cause; and the question before the court was, whether the defendant had entitled himself to relief in a court of justice, or must be turned over to legislative aid. Upon the questions of evidence, presented in the cause, the court said—this, then, presents a case, where all the books, papers and vouchers of the defendant, relating to his disbursements and agency, have been destroyed by fire, without any fault of his; and is, of necessity, open to the admission of secondary evidence; and under the general rule of evidence, he might be required to produce the best evidence which the nature of the case, under the circumstances, would admit. This rule, however, does not require of a party the production of the strongest possible evidence; but must be *governed, in a great measure, by the circumstances of the case; and must [*2
have a bearing upon the matter in controversy; and must not be such as to leave it open to the suspicion of presumption, that anything left behind, and within the power of the party, would, if produced, make against him.

Suppose, a debtor should put into the hands of an agent, a sum of money, for the payment of specified demands against him, and the amount limited to such demands; and to be paid in small sums, to a numerous class of creditors, scattered over various and distant parts of the country; and it should be made to appear, that he had disbursed all the money thus put into his hands, but that the vouchers for such payments had been destroyed by fire, without any fault of his; and he could not ascertain the names of the creditors to whom payment had been made; but that no claim had been presented to his principal, by any one of the creditors, to whom payment was to be made by the agent, after the lapse of three years; and all this, accompanied by proof, that he had faithfully discharged the duties of a like agency for several years, and regularly accounted for his disbursements; would it not afford reasonable grounds to conclude, that he had disbursed all the moneys placed in his hands by his principal, for the purposes for which he received it; and protect him against a suit for any balance?

It appeared, that the defendant offered to read in evidence, certain passages from a public document, mentioned in the bill of exceptions; the plaintiffs' counsel consented to its being read, as the defendant's evidence; and after the same was read, the plaintiff's counsel requested the court to instruct the jury, that the conversation of the defendant with Mr. Dickens and Mr. McLean, read from the executive document, was not evidence to the jury of the *facts* stated in such conversation; which the court refused to give. The entire document referred to, is not set out in the bill of exceptions; and from what is stated, no conversation of the character objected to appears; but the evidence was admitted by consent; the plaintiffs were entitled to have the whole document read; and it was all in evidence before the court and jury. But the objection, on the ground that some of the facts stated were only hearsay evidence, fails; the document, so far as it appears on the bill of exceptions, contains no such conversation; this instruction was, therefore, properly refused.

United States *v.* Laub, 4 Cr. C. C. 703, affirmed.

Error to the Circuit Court of the District of Columbia, and county of Washington. The United States instituted two actions of *assumpsit* against the defendant, to recover the balances stated to be due to the United States, on transcripts regularly certified by the treasury department. The first account was with the defendant, as "agent for paying the contingent expenses of the office of the secretary of the treasury;" and charged a balance due to the United States, on the warrants drawn by the secretary of the treasury, in favor of the defendant, amounting together to $4000. It credited a payment of $241.58, paid on the 22d July 1833, leaving a balance due to the United States, on the 14th November 1833, of $3776.58.

*3] *The other account was against the defendant as "superintendent of the south-east executive building, in relation to the compensation of superintendent, and watchman of said building; and after charging a warrant of $425, and crediting $114.97, paid July 22d, 1833, claimed a balance of $310.03. The whole sum claimed to be due to the United States, on the two transcripts, was $4086.51. In the other action, the United States claimed $7769.25. This account was for a treasury warrant for $2000, and for $5769.25, for balances due by the defendant as "superintendent of the south-east executive building," in relation to contingent expenses of the said building, to alterations and improvements thereof, and to inclosing the grounds attached thereto; and also as "agent for expenditures in relation to insolvent debtors," and in relation to manufactures.

The defendant pleaded *non assumpsit* to both actions, and the cases were tried together, in the circuit court; the jury found verdicts for the defendant. Three bills of exception, entirely similar, were taken in each case, by the plaintiffs, and judgment being given for the defendant, the plaintiffs prosecuted this writ of error. The material facts of the case, in the bills of exception, are stated in the opinion of the court.

The case was argued by *Butler*, Attorney-General; and by *Coxe*, for the defendant.

Thompson, Justice, delivered the opinion of the court.—This case comes up on a writ of error from the circuit court of the district of Columbia for the county of Washington. The action is founded upon a balance certified at the treasury, against the defendant, for $11,855.86. A verdict was found by the jury for the defendant; and upon the trial several bills of exception were taken to the instructions given by the court.

The main question in the case related to certain credits, which the

defendant claimed to have allowed to him ; and which had been rejected by the accounting officers of the treasury. *These credits, so claimed and rejected, consisted of three items, as stated in the defendant's [*4 claims : 1st. $493.16, paid the Bank of the Metropolis, for advances to individuals : 2d. $3852.15, for drafts drawn by the Bank of the United States in favor of individuals, between the 1st of October 1832, and the 1st of April 1833 : 3d. $2954.43, claimed as a credit for disbursements to sundry persons, whose names were not recollected ; the vouchers, as was alleged, havbeen destroyed in the conflagration of the treasury department.

After the evidence in the cause was closed, the plaintiffs, by their counsel, prayed the court to instruct the jury, that the defendant was not entitled to the credit claimed for the three items above mentioned ; which instructions the court refused to give. But, upon the prayer of the defendant, gave to the jury the following instruction : " That if, from the evidence aforesaid, they shall believe, that the defendant has faithfully paid over for public purposes, and within the sphere of his official duty, all the public money which came to his hands, then the plaintiffs were not entitled to recover ;" and bills of exception were taken on the part of the plaintiffs to the refusal to give the instructions prayed in their behalf, and to the instructions given on the prayer of the defendant. There was another bill of exceptions taken, which will be noticed hereafter.

It will be seen, from this statement, that the instruction prayed on the part of the plaintiffs, was a positive direction to the jury, that the defendant was not entitled to the credit claimed by him for the three items above mentioned. If the court erred in refusing to give this instruction, it must have been either by reason of some insuperable objection in point of law against the claims ; or because there was no evidence whatever before the jury in support of them. There is no pretence for the instruction prayed, on the first ground. No objection was made to the admissibility in evidence of the claims, if any could have been made ; but none did exist. It was a claim made by the defendant for disbursements or payments made by him, in discharge of his appropriate duties under the trust assumed ; and the claims, if necessary, under the act of the 3d March 1797 (of which there may *be some doubt), had been presented to the accounting officers of the treasury, and disallowed ; and was, of course, open to be set up on [*5 the trial of this cause. If, therefore, the court erred in not giving the instructions asked on the part of the plaintiff, it must have been on the ground, that *no* evidence, tending to prove the matter in dispute, had been given to the jury. For it is a point too well settled to be now drawn in question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury ; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error. All the evidence on the trial was admitted, without objection ; and the instructions asked from the court, did not point to any part of the evidence as inadmissible or irrelevant ; but for a general direction, upon the whole evidence, that the defendant was not entitled to the credits claimed by him for the three items above mentioned.

The general outlines of the case, as stated in the bill of exceptions, are : That the defendant had been a clerk in the treasury department of the United States, and as such, and as agent under the authority of the

secretary of the treasury, had disbursed public moneys, under several heads of appropriation; some, specific and temporary; others, of a more permanent and general character. That he was required to take an oath faithfully to perform the duties of his office; and had performed such duties, during the years 1831 and 1832, and up to the 30th of March 1833. That on the night of the 30th of March 1833, the treasury building was consumed by fire; which destroyed all the books, papers and vouchers relating to the public business of the department. That, by the course of business, in conducting his agency, the money was placed in his hands, by warrants from the secretary of the treasury, in his favor, as agent; which warrants were issued by the secretary, upon the requisition of the defendant, stating the purpose for which the money was required, and at the discretion of the secretary. The warrants thus issued were charged to the defendant on the books of the treasury, and placed to his credit, as agent, in the branch Bank of the United States, at Washington; and the moneys drawn out of the bank by the defendant's checks, as such agent, in favor of the individuals respectively, to whom the same was payable, which was according to the usual practice of other disbursing officers. And it appeared, that after the destruction of the treasury building, by an order drawn by the secretary
*6] of the treasury, all the moneys *standing to the credit of the defendant in the branch bank, on the 20th of March 1833, were drawn out, except ten dollars. It also appeared, that the books of the bank do not furnish any information showing the names of the persons or the character of the services for which the moneys were disbursed; but merely exhibit the dates of the checks, and the amount of the money for which they were drawn respectively. The defendant also showed, that he kept no private account in the bank, nor any other account than as agent. That, during the period in which he had performed the duties of such agent, he had settled his accounts with punctuality, and entirely to the satisfaction of the accounting officers. That such accounts, so far as specific appropriations had been made, were settled up to the 1st of January 1833, and the others up to the 1st of October 1832; and that, for all the vouchers accompanying such settlements, so far as the same extends, corresponding checks appear in the bank statement.

Such being the general outlines of the case, and no dispute, except in relation to the three items above mentioned, the question arises, whether there was any evidence before the jury, conducing to prove the disbursements of the defendant thus claimed. All suspicion of a fraudulent misapplication by the defendant of the money placed in his hands, was disclaimed on the argument; and the question seemed to resolve itself into the inquiry, whether, under the evidence in the cause, the defendant had entitled himself to relief in a court of justice, or must be turned over to legislative aid?

This, then, presents a case, where all the books, papers and vouchers of the defendant, relating to his disbursements and agency, have been destroyed by fire, without any fault of his; and is, of necessity, open to the admission of secondary evidence. And under the general rule of evidence, he might be required to produce the best evidence which the nature of the case, under the circumstances, would admit. This rule, however, does not require of a party the production of the strongest possible evidence; but

must be governed, in a great measure, by the circumstances of the case, and must have a bearing upon the matter in controversy; and must not be such as to leave it open to the suspicion or presumption that anything left behind, and within the power of the party, would, if produced, make against him. But the evidence in this case is not open to the objection, that it was not the best evidence in the power of the party; no objection on that ground was made at the trial: and the case is then brought to the single point, was there any evidence before the jury, conducing to *support the claim for the disbursements, which were rejected by the accounting officers. [*7

With respect to the $493.16, claimed under the charge of moneys paid the Bank of Metropolis, for advances to individuals having claims against the government; it was proved, that it was the practice in the treasury department, to pay the clerks, &c., monthly, when there were funds out of which they could be paid: and that it was usual, when such moneys were due and payable, and there were no such funds, or when the appropriation bill had not been passed by congress, for the defendant to give such as required it, a certificate, showing the amount due, and that it would be paid when the appropriation bill should pass. Upon which certificate, the holder would obtain either an advance, or discount from the banks; and that the defendant had given several such certificates, which, in the winters of 1832–3, had been brought to the Bank of Metropolis, and money paid on them; and that some time in March 1833, after the appropriation bill had passed, all the certificates held by the bank, were carried to the defendant; who gave in lieu of them a check upon the branch bank, which had been paid. But the witness did not recollect the amount paid, nor the names of the persons to whom the certificates had been given, but only that there were several of them, and the amount considerable; but that the books of the bank contained no information on the subject. This was certainly evidence, and that, too, not of a very slight character, conducing to prove the disbursement claimed. The precise amount was not proved; but all the defendant's vouchers being destroyed, and the bank books furnishing no information on the subject, it was a question for the jury to decide, as to the amount thus paid; taking their evidence in connection with the other evidence in the cause.

With respect to the claims for drafts drawn by the branch bank in favor of individuals, between the 1st of October 1832, and the 1st of April 1833, the evidence was, that sometimes, when money were to be disbursed at a distance, the defendant would obtain drafts from the cashier of the bank, upon other banks or branches where the money was disbursable; which drafts were drawn in favor of the defendant, and indorsed by him to the party who was to receive the money, and remitted to him by mail; and that such was the usual practice of other disbursing officers. And it appeared, from the *statement of the branch bank, that the drafts of this description, drawn in favor of the defendant, between the 1st of October 1832, and the 1st of April 1833, corresponded in amount precisely with the sum claimed. It does not appear, what became of these drafts. But in the natural course of business, they would go into the possession of the person to whom payment was to be made; and a receipt for the same returned to the defendant, which have been destroyed by the fire. This [*8

evidence, although not conclusive, afforded presumption that such was the fact. It was, at all events, evidence conducing to prove the payments, and was matter for the jury.

With respect to the other claim of $2954.43, there is no evidence particularly pointed to this item. But there was evidence of a more general character, which, under the circumstances of the case, at least afforded some grounds for the conclusion, that the money had been applied to the payment of claims on the government. It stands charged in the account presented to the accounting officers of the treasury, as a claim for disbursements to sundry persons, whose names could not be recollected; the vouchers having been destroyed in the burning of the treasury building. The jury had evidence of the destruction of the vouchers for such disbursements, if any ever existed; it was in evidence, that the money placed in the defendant's hands, was, by means of warrants, drawn by the secretary of the treasury, upon the requisitions of the defendant, stating the purpose for which the money was required—the amount resting in the discretion of the secretary; and that the warrants thus drawn, were passed to the credit of the defendant, as agent, in the branch Bank of the United States, at Washington; and drawn out by his checks, as such agent, in favor of the individuals to whom the same was payable; and that all the money had been drawn out except ten dollars. Under such circumstances, where is the ground upon which any misapplication of the money is chargeable upon the defendant? If he has disbursed all the money he has received, for the purposes for which he received it, the government can have no claim upon him. The amount of money placed in his hands was governed and limited by the specific purpose and object stated in the requisitions of the defendant, to which it was to be applied; and was, of course, confined to disbursements known to the secretary, and warranted by law. And it was in evidence, that, by the practice of the department, no persons entitled to payment, through the agency of the defendant, could receive payment from the government, *unless, their accounts were accompanied with the oath of the claimant, or other satisfactory evidence that he had not been paid. Add to this, that no claim has been made upon the government, for payment of any demand falling under the agency of the defendant. Does not this afford reasonable ground to conclude, that he had applied all the funds placed in his hands, to the purposes for which they were intended? At all events, it was evidence conducing to prove it; and the effect and sufficiency of it, was a question for the jury.

*9]

It is not intended to apply to this case, a different rule than would be applied to any other agency for the disbursement of money, under like circumstances. Suppose, a debtor should put into the hands of an agent, a sum of money, for the payment of specified demands against him, and the amount limited to such demands, and to be paid in small sums, to a numerous class of creditors, scattered over various and distant parts of the country: and it should be made to appear, that he had disbursed all the money thus put into his hands, but that the vouchers for such payments had been destroyed by fire, without any fault of his, and he could not ascertain the names of the creditors to whom payment had been made; but that no claim had been presented to his principal, by any one of the creditors, to whom payment was to be made by the agent, after the lapse of three years;

and all this accompanied by proof, that he had faithfully discharged the duties of a like agency for several years, and regularly accounted for his disbursements; would it not afford reasonable ground to conclude, that he had disbursed all the moneys placed in his hands by his principal, for the purposes for which he received it, and protect him against a suit for any balance? Considering the number and character of the claims to be paid by the defendant; a lapse of nearly three years from the burning of the treasury building to the time of trial, and no claim having been made by any one entitled to payment through the defendant's agency, is a circumstance affording presumptive evidence that all had been paid.

Upon the whole, under all the circumstances of this case, we are of opinion, that the court did not err, in refusing to give the instructions prayed on the part of the plaintiffs; nor in giving the instructions to the jury, that if from the evidence, they should believe, that the defendant had faithfully paid over, for public purposes, and within the sphere of his official duties, all the public money which came to his hands, the plaintiffs were not entitled to recover.

*The second bill of exceptions was abandoned on the argument, and need not be noticed. [*10

A third bill of exceptions was taken at the trial; by which it appears, that the defendant offered to read in evidence, certain passages from a public document, mentioned in the bill of exceptions. The plaintiffs' counsel consented to its being read as the defendant's evidence. And after the same was read, the plaintiffs' counsel requested the court to instruct the jury, that the conversation of the defendant with Mr. Dickens and Mr. McLean, read from the executive document, was not evidence to the jury of the *facts* stated in such conversation; which the court refused to give. The entire document referred to, is not set out in the bill of exceptions; and from what is stated, no conversation of the character objected to appears. But the evidence was admitted by consent. The plaintiffs were entitled to have the whole document read; and it was all in evidence before the court and jury. But the objection, on the ground that some of the facts stated, were only hearsay evidence, fails. The document, so far as it appears on the bill of exceptions, contains no such conversation. This instruction was, therefore, properly refused; and the judgment of the court below is affirmed.

Judgment affirmed.

*The Lessee of GABRIEL SWAYZE and MARY his wife, Plaintiffs in error, *v.* ROBERT BURKE, D. SHERMAN, GEORGE JACKSON and JAMES HINSMAN, Defendants.

Fraud.—Bonâ fide purchaser.

John Ormsby died in Allegheny county, Pennsylvania, in December 1805, having a son, Oliver, who administered to his estate; he had also a son who had married in Mississippi, and who died in 1795, leaving an infant daughter; Oliver Ormsby filed no inventory of the estate of his father, and never settled an account as administrator; and in 1826, he confessed a judgment in favor of the Messrs. Penns, for a part of the purchase-money of valuable real estate, which had been held by John Ormsby, in his lifetime. In the suit against him for this debt, Mr. James Ross acted as the attorney for the plaintiffs; and in 1827, the real estate was sold under an execution issued by Mr. Ross on the judgment, and was purchased by Mr. Ross for $3000; he having, before the purchase, given Oliver Ormsby to understand, and having publicly declared, that he would hold the property as a security for the debt due to the Messrs. Penns; and on the payment of the debt, that he would relinquish all claim to it. In April 1831, Oliver Ormsby paid the debt to Mr. Ross, and took a conveyance of the property; at the same time, he gave a receipt, as administrator of John Ormsby, to the sheriff, for the balance of of the $3000; he claimed to hold the property so purchased as his own. In March 1828 Oliver Ormsby wrote to the wife of the plaintiff in this ejectment, who was the daughter of John Ormsby, junior, stating that his father had not left more property than would pay his debts; there was evidence, that less than one-tenth of the real estate would have satisfied the judgment, for which the land sold to Mr. Ross; the latter had no knowledge of any fradulent purpose of the administrator. The daughter of John Ormsby, junior, having intermarried with Gabriel Swayze, with her husband, brought an ejectment to recover a moiety of the land which was held by Oliver Ormsby, under the conveyance from Mr. Ross. The court instructed the jury, that, "in matters of fraud, courts of law and chancery have a concurrent jurisdiction; it is, therefore, within the province of the jury, to inquire, whether the conduct and proceedings of Oliver Ormsby, whereby the legal title to the property in dispute became vested in himself, for his exclusive use and benefit, were in fraud of his co-tenant Mary Swayze; and if they were, the verdict ought to be for the plaintiffs." "That the fraud should be brought to the knowledge of Mr. Ross; and that if Mr. Ross took a valid title under the sheriff's deed, the title of the vendee would judge be good, under the circumstances disclosed in the evidence." We think that they erred in charging the jury that the deed to Ormsby was valid, unless they should find that Ross participated in the fraud.

It is clear, that a purchaser at sheriff's sale cannot protect himself against a prior claim of which he had no notice; or be held a *bonâ fide* purchaser, unless he shall have paid the money.[1]

That fraud is cognisable in a court of law, as well as in a court of equity, is a well-established principle; it has often been so ruled in this court.

As there is no court of chancery, under the laws of Pennsylvania, an action of ejectment is sustained, on an equitable title, by the courts of that state. Such is not the *practice in the courts of the United States; and if the plaintiffs in an ejectment fail to show a paramount legal title in themselves, they cannot recover.[2]

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[1] No person can claim to occupy the position of a *bonâ fide* purchaser, without notice, unless he has acquired the legal title, and paid the purchase-money in full. Villa *v.* Rodriguez, 12 Wall. 338. And the payment of the purchase-money must be affirmatively shown, otherwise than by the recital in the deed. Bolton *v.* Johns, 5 Penn. St. 145; Jackson *v.* Summerville, 13 Id. 359; Coxe *v.* Surtwell, 21 Id. 480; Lloyd *v.* Lynch, 28 Id. 419. The purchaser of an equitable title takes subject to all countervailing equities to which it was subject in the lands of his vendor. Chew *v.* Barnet, 11 S. &. R. 389; Reed *v.* Dickey, 2 Watts 459; Kramer *v.* Arthurs, 7 Penn. St. 165. He does not occupy the position of a *bonâ fide* purchaser, as against the owner of the legal title. Aldrich *v.* Bailey, 71 Id. 246.

[2] It is well settled, that in the federal courts, ejectment will not lie on an equitable title. Bagnell *v.* Broderick, 13 Pet. 436; Gilman *v.* Poindexter, 10 How. 257; Fenn *v.* Holme, 21 Id. 481; Hoopes *v.* Scheimer, 23 Id. 235; Sheirburn *v.* Cordover, 24 Id. 423; Carson *v.* Boudinot,

Swayze v. Burke.

ERROR to the District Court for the Western District of Pennsylvania. The case, as stated in the opinion of the court, was as follows:

An action was instituted in the district court of the United States for the western district of Pennsylvania, by the lessors of the plaintiffs, Gabriel Swayze and wife, citizens of the state of Mississippi, for the recovery of a tract of land in Allegheny county, in the state of Pennsylvania, to October sessions 1833. The plaintiffs and the defendants claimed the land under a deed from John Penn and John Penn, junior, proprietaries of Pennsylvania; the land forming part of one of the manors reserved by the proprietaries. John Ormsby died intestate, in 1791, and left a son, named Oliver, a daughter, Sidney, who intermarried with John Gregg; a son named John, who married and died in the state of Mississippi, leaving a daughter Mary, an infant, at the time of his decease; and who had since intermarried with Gabriel Swayze, the plaintiff in error. In December 1807, Oliver Ormsby administered to the estate of his father, John Ormsby, and gave the usual administration bonds; but he filed no inventory of the estate of the intestate; nor did he, at any time, settle an account of his administration of the estate.

The estate of John Ormsby, deceased, was indebted to John Penn and John Penn, junior, for the land purchased from them, in the sum of $467.64; and on the 6th of September 1826, the administrator confessed a judgment in their favor, for the amount of the debt; upon which judgment, an execution was forthwith issued by Mr. Ross, their attorney, and the land of John Ormsby was levied on and sold; Mr. Ross being the purchaser of the same, for $3000. At the time of the purchase of the estate, Oliver Ormsby, the administrator, was absent. Mr. Ross declared, in the most public manner, that Ormsby, the administrator, or any of the family of the deceased John Ormsby, might redeem the land, at any time, on the payment of the debt and interest. Before the sale, Oliver Ormsby, the administrator, was informed by Mr. Ross, that he only wanted the money due upon the judgment, and that he did not intend to buy the land, to hold it. Ormsby, the administrator, was in possession of the land, at *the time of the sale, and continued in possession of it; and at the time of the sheriff's sale, [*13 or when the deed for the land was made to him, by the sheriff, Mr. Ross paid no money. The rents and profits of the land were continued to be received by Oliver Ormsby; and in April 1831, he paid to James Ross, Esq., the sum of $523, the amount of the judgment, and the interest due thereon, and took from him a conveyance of the land in fee-simple; giving to the sheriff, at the same time, as administrator of John Ormsby, a receipt for the sum of $3000, less $523, the amount of the payment to James Ross, Esq., in satisfaction of the debt due to the Messrs. Penns. The land consisted of eighteen coal-hill lots, and of thirty-five acres of land adjoined to them, and was now of great value. It was highly valuable at the time of the sheriff's sale. The defendants were in possession of the property, as tenants of Oliver Ormsby, when the suit was commenced.

In March 1828, in answer to an application for information as to the value of the estate of John Ormsby, by Mrs. Swayze, one of the lessors of

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2 W. C. C. 33; Carpentier *v.* Montgomery, 13 Wall. 480. Nor can a defendant in ejectment defend in an equitable title. Larriviere *v.* Modegan, 1 Dill. 455; Hull *v.* Austin, 1 Deady 104; Stark *v.* Starr, 1 Sawyer 15.

the plaintiff, Oliver Ormsby wrote, "my father, at his death, was not possessed of more property than a sufficiency to pay his debts, having, from time to time, sold to individuals, and conveyed to his children." Evidence was also given, conducing to prove, that by a sale of two of the coal lots, the judgment could have been satisfied.

The case was tried at October term 1835, and a verdict and judgment were rendered for the defendants, under the charge of the district judge. The plaintiffs excepted to the opinion of the court, and prosecuted this writ of error.

On the trial of the cause, the counsel requested the district judge to charge the jury, "in matters of fraud, courts of law and chancery have a concurrent jurisdiction. It is, therefore, within the province of the jury, to inquire, whether the conduct and proceedings of Oliver Ormsby, whereby the legal title to the property in dispute became vested in himself, for his exclusive use and benefit, were in fraud of the rights of his co-tenant, Mary Swayze; and if they were, the verdict ought to be for the plaintiffs." The court gave the instructions as requested, with this qualification, that the fraud should be brought to the knowledge of Mr. Ross; if he took a valid title, under the sheriff's deed, the title of his vendee would be good, under the circumstances disclosed in the evidence.

*14] *The argument of *Fetterman*, for the plaintiffs in error; and of *Watts*, for the defendants, was submitted to the court, in writing, at the close of January term 1836.

Fetterman contended, that it is now an admitted maxim at law, that fraud is cognisable at law, as well as in equity; and whether that inquiry can be made in an action of ejectment, is the question. This court, in the case of *Gregg* v. *Sayre's Lessee*, 8 Pet. 252, says, "it is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery in case of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of the jury to find the facts, and determine their character, under the direction of the court." It is worthy of remark, that that was an action of ejectment.

We find also, that as early as *Fermor's Case*, 3 Co. 77 *a*, the principle settled, "that fraud vitiates all transactions;" so, in *Gilbert* v. *Burgott*, 10 Johns. 462, which was an action of ejectment, KENT, Chief Justice, in delivering the opinion of the court, says, "courts of law have concurrent jurisdiction in all cases of fraud; fraud will invalidate, in a court of law, as well as in a court of equity, and annul every contract and conveyance connected with it; a fraudulent estate is as no estate, in judgment of law." Lord MANSFIELD, in the case of *Cadogan* v. *Kennett*, Cowp. 434, says, "the principles and intent of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law could have attained every end effectuated by the statutes of Elizabeth:" and the same judge, in *Bright* v. *Eynon*, 1 Burr. 395, remarks, "fraud or covin may, in judgment of law, avoid every kind of act." Courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. So, Judge PARSONS, in *Boynton* v. *Hubbard*, 7 Mass. 112, "but when a court of law has regularly the fact of fraud admitted or proved, no good reason can be assigned why relief shall not be obtained there." So, in

18 Johns. 111, which was the case of an ejectment on an alleged fraud in a sheriff's sale, the same principle is expressly re-affirmed; also, in *Fleming* v. *Slocum*, same book, p. 403–4; and in Pennsylvania, in *Gilbert* v. *Hoffman*, 2 Watts 66, which was an action of ejectment, Justice ROGERS, in delivering the opinion of the court, reiterates the same principle: "a *covinous* conveyance of land, is as *no* conveyance against the interest intended to be defrauded." "It is certainly not the duty of a court, *to protect the interest of a person who has been detected in an attempt at fraud." [*15 "The devisee or heir whom the vendee attempted to defraud, for the attempt affects him as well as creditors, asks the aid of the statute against this fraudulent conveyance, on the ground, that his title cannot be affected by a fraudulent sale. His remedy is strictly at law, for fraud is cognisable in a court of common law, as well as in a court of equity. A fraudulent vendee has no equity, and is not entitled to claim the protection of law on that ground." This case, as well as in the cases of *Riddle* v. *Murphy*, 7 Serg. & Rawle 230; *Bowers's Lessee* v. *Crafts*, 18 Johns. 110; *Lazarus* v. *Bryson*, 3 Binn. 54; 5 Cow. 67, 78; *Johnston's Heirs* v. *Harvy*, 2 P. & W. 93, were actions of ejectment, in which the question of fraud was considered as proper matter of inquiry.

Unless, according to the opinion of the judge of the district court, Mr. Ross is guilty of fraud the plaintiffs cannot recover; no matter how fraudulent the intentions and conduct of Oliver Ormsby may have been. The heir of John Ormsby cannot recover from Oliver Ormsby, unless she proves that Mr. Ross was *particeps criminis*. The debt for which the property was sold, was due at the death of John Ormsby; its existence was known to Oliver Ormsby, his administrator; he promised to pay it, in 1820. In Pennsylvania, lands have always been assets for the payment of debts. *Graff* v. *Smith's Administrators*, 1 Dall. 481; *Morris* v. *Smith*, 1 Yeates 238. Either to an action of debt, as a cause of action, or when resort must be had to a *scire facias*, after the death of the debtor, it issues not against the heirs, upon whom the law cast the inheritance; but against the executor or administrator, who, so far as relates to the payment of the debts, is the trustee of the real estate. *Rogers* v. *Rogers*, Hopk. Ch. 526–7, a case very similar to this; and *Brown* v. *Webb*, 1 Watts 411.

How does it become material to show, that Mr. Ross was guilty of fraud? It is alleged, that Ormsby was guilty of an attempt to defraud his co-heirs out of this property; and if he was guilty of such, how can his situation be either benefited or injured by the fact that Mr. Ross was or was not equally guilty of the fraud? The law abhors all kinds of fraud, whether open or by any kind of indirection; and when the action is against the party guilty of the fraud, or his heirs, it is *not for him or his heirs to shelter themselves from the consequences of his own wicked designs. As early [*16 as *Tresham's Case*, 9 Co. 110, in an action against an administrator, it was resolved by the court, on the 4th point of the case, "that although a general allegation of covin, which, as held in *Talboise's Case*, ought to be between two or more, would be sufficient; yet *à fortiori*, in case of fraud which may be in the heart of one only; for if one by deed make a fraudulent gift of his goods to divers, who knew not of it, it is fraudulent in him who makes it." And so it was adjudged in *Turner's Case*, 8 Co. 133 *a*, that fraud may be in one or one party only; and again, in the same case, the court say, that

fraud may be committed by one alone: and in *Turner's Case*, the court held, that although an administrator may lawfully confess a judgment in favor of one creditor, yet if that creditor afterwards is satisfied, or offers to compromise, and offers to take sixty pounds for one hundred pounds, and the administrators do not do it, to the intent that the judgment may stand in force, so that third persons may be defrauded, and the administrators convert the deceased's goods to their private use, which is altogether against their office and the trust reposed in them; and therefore, be such agreement, either precedent, before the recovery, or subsequent, after the recovery, it is all one as to the creditor, who is a third person; for he is defrauded as well by the subsequent agreement as by the agreement precedent: and in 2 Johns. Ch. 42–3, it is ruled, that a deed, fraudulent on the part of the grantor, may be avoided, though the grantee may be a *bonâ fide* purchaser, and ignorant of the fraud.

This brings us to the important inquiry in this case, whether an executor or administrator, or any other individual standing in a fiduciary capacity, can purchase the real estate, either directly or indirectly, at a public sale, occasioned by his own neglect and misfeasance, as in this, and hold the same, to the exclusion of his co-heirs; upon this point, the books are full of authority. Courts both of law and equity have reiterated the position, that it cannot be done. The law will not thus suffer a man to be led into temptation, by taking away from him all inducement to fraud. The general principle is strongly laid down in the able commentaries of Mr. Justice Story, on Equity, 318. The principle applies, however inconvenient to purchasers in any given case; it is poisonous in its consequences; and the same principle is advocated by Chancellor Kent, in his commentaries, vol. 4, p. 438–9. *On this point, there was also cited, *Wormley* v. *Wormley*, 8 Wheat. 441; 1 Mason 241, 345; *Davoue* v. *Fanning*, 2 Johns. Ch. 252; *Lazarus* v. *Bryson*, 3 Binn. 54; *Moody* v. *Vandyke*, 4 Ibid. 43; *Rham* v. *North*, 2 Yeates 118; *Lamberton* v. *Smith*, 13 Serg. & Rawle 310; *Rogers* v. *Rogers*, Hopk. Ch. 527; *Downes* v. *Gray*, 3 Meriv. 200; *Nelthrop* v. *Pennyman*, 14 Ves. 510; *Whelpdale* v. *Cookson*, 1 Ves. sen. 9; *Ex parte Lacey*, 6 Ves. 626; *Lister* v. *Lister*, 6 Ibid. 630; 1 Powell on Mortgages 124; *Coles* v. *Trecothick*, 9 Ves. 234; *Evertson* v. *Tappen*, 5 Johns. Ch. 439.

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After referring to these cases, we may appeal to the facts of this case, and confidently ask, where was the necessity of proving that Mr. Ross lent himself to the fraudulent intentions of Oliver Ormsby, before we can recover from trustees the estate he and they held by fraud. It is humbly imagined, in this part of the case, the learned judge was in error. An individual may concert a scheme of fraud, he may employ a hundred different agents, they may each believe his intentions perfectly honest—they, as in this case of Mr. Ross, may not know that there were other lawful heirs to the estate, except Ormsby and his lunatic sister, then partly under his care—they may each believe his intention pure; and yet we must prove them all parties and privies to the fraudulent intentions of the maker of the fraud, before we can defeat the estate so unfairly acquired. How was Mr. Ross to know whether there was personal property to pay the debts? How was he to know that Mrs. Swayze was an heir, residing in Mississippi? How was he to know that Oliver Ormsby had been guilty of falsehood to her; that in

1828, a year after the sheriff sold, before a dollar was paid either by Ross or Ormsby, that Osmsby had written to her, telling her his father had left no property? Yet Oliver Ormsby knew all these things, and the court say, although he was guilty of fraud, yet the plaintiffs cannot recover, unless Mr. Ross was also guilty of it.

In considering that part of the charge of the court connected with this point, we do not wish to scan it nicely, but to give it a fair and liberal construction; and in doing so, must observe, that it neither corresponds with the facts of the case, nor the law of the land, as we understand it. It is all true, that Mr. Ross attended at the sheriff's sale, and had the property knocked off to him in a lump, "chilling, by his presence, the sale," saying, "If Ormsby or any of his family can get able to redeem it, he, or any of his family, might have it, on paying the debt and interest;" the very effect of a declaration of this kind would be *to prevent the property from bringing its full value. Ross never interfered with Ormsby in the [*18 possession of the property—paid no money to the sheriff, and there was no money paid until 1831, when Ormsby paid Ross the amount of the judgment, and receipted to the sheriff, as administrator of his father's estate, for the balance of the bid at the sale. How then could the court take the facts of the case from the jury, and say "that Mr. Ross, who never paid a dollar, was a *bonâ fide* legal purchaser—that he bought for himself, not as a trustee for Ormsby or any body else?"

It was relied on, as one of the strong circumstances conducing to prove fraud, that there was no change of possession. It may also be well asked, to whom did the property belong, when Ormsby receipted to the sheriff, as administrator of his father's estate? The property is paid for, if paid at all, with the money of the heirs of John Ormsby. Without their consent, no man and no court had a right to convert more of the real estate into money, than was sufficient to pay the debts. We have here the case of an administrator purchasing at sheriff's sale, individually, and paying for the land with the plaintiff's money. Can plaintiffs resort to the land? In 1 Serg. & Rawle 144, where real estate was bought by a guardian, with the funds of his wards, the land was treated as theirs; and his making the conveyances to himself exclusively, was held fraudulent of itself: what is this but the ordinary case of a man purchasing with the money of others, and taking the deed in his own name? See *Kisler* v. *Kisler*, 2 Watts 324; and *Lane* v. *Dighton*, Ambl. 406; *Lench* v. *Lench*, 10 Ves. 506; and *Waite* v. *Whorwood*, which was the case of an executor, in 2 Atk. 159; *Wolf* v. *Eichelberger*, 2 P. & W. 347. So, in *Hempstead* v. *Hempstead*, 2 Wend. 109, it is expressly said by the court, that *cestuis que trust*, who have paid the consideration money of land patented in other names, may maintain ejectment. See opinion of the court, page 134. In *Fellows* v. *Fellows*, 4 Cow. 682, it was decided, that an administrator who buys land on a judgment of his intestate, must account for it to his *cestuis que trust;* he was an agent and trustee, and could not divest himself of the trust. Cited also, on this point, the cases of *Hampton, Guardian*, 17 Serg. & Rawle 144; *Ryerson* v. *Nicholson*, 2 Yeates 516; *Groff* v. *Jones*, 6 Wend. 522; *Cary* v. *Sprague*, 12 Ibid. 46; *Bowen's Lessee* v. *Craft*, 18 Johns. 110; *Jackson* v. *Newton*, 18 Ibid. 362; *Woods* v. *Monell*, 1 Johns. Ch. 502; *Stead* v. *Course*, 4 Cranch 403; *Sampson* v. *Sampson*, 4 Serg. & Rawle 329; *Greenleaf* v.

Burk, 9 Pet. 292 ; 2 Watts *494–5; *Commonwealth* v. *Breed*, 4 Pick. 460 ; *Benham* v. *Cary*, 11 Wend. 83 ; *Bryden* v. *Walker*, 2 Har. & Johns. 292 ; 8 Cow. 406 ; 4 Wend. 303 ; 2 Watts 66 ; 7 Wend. 438 ; 2 Mason 536 ; *Rhoades* v. *Selin*, 4 W. C. C. 720.

Watts, for the defendants in error, upon the exception taken by the counsel for the plaintiff to the charge of the court, that fraud must be brought to the knowledge of Mr. Ross, and that the title derived from him was good in his vendees, contended, that this point involved a question of law and a question of fact. As to the question of law, that the court had jurisdiction of the subject-matter of controversy, the court answered it as requested by the plaintiff ; for the whole cause, the charge of the court, the verdict and judgment, was based upon the fact that the court did entertain jurisdiction. And as to the matter of fact, whether the conduct of Oliver Ormsby was fraudulent or not, it was expressly referred to the jury to determine. Any other direction by the court would have been erroneous. This point necessarily raises the question, whether the conduct of Ormsby was fraudulent ? The argument of the plaintiff assumes the fact, that Mr. Ormsby was the trustee of the heirs of his father, John Ormsby, deceased. In Pennsylvania, there is no kind of connection between the administrator of the personal estate, and the interests of the heirs, as regards the real estate ; as to the realty, the administrator is as a perfect stranger ; and upon a sale of it by the sheriff, upon an execution, he may become the purchaser. Cases have been cited, in the argument of the plaintiff's counsel, to show that an administrator cannot become a purchaser of land sold by himself ; also, that fraudulent conduct of an administrator, in making sale of land, will vitiate it. This is true, but it is difficult to discover what application it has to the law of this case. Whenever an administrator makes a sale of land in Pennsylvania, he does not do it as an administrator *ex officio*, but by a special order of the orphans' court, for some particular purpose ; such as the payment of debts. In such case, he cannot be the vendor and vendee ; and it is equally plain, he must act fairly in conducting such sale ; and this is the principle established by the cases referred to.

If the plaintiff had it in his power to show that personal estate of John Ormsby had come to the hands of his administrator, O. Ormsby, to an amount
*20] sufficient to pay the debt of the Penns ; and that he had *not paid it, but suffered the land to be sold, and become the purchaser himself, there would have been some pretext for the argument, that O. Ormsby's title was fraudulently obtained ; but as the facts are, and the proof in the cause is, that, although O. Ormsby did take out letters of administration, no estate ever came to his hand to be administered, or which, by law, was applicable to the payment of the debts of the intestate ; no trust, in relation to the land in dispute, existed between the parties to this action ; and Oliver Ormsby was as competent to become the purchaser at sheriff's sale, as any other individual.

But he did not thus purchase. When James Ross purchased the land, he purchased it for himself ; and if he be believed, he never had any previous understanding or arrangement with O. Ormsby on the subject. His object was, first, to secure the debt due to the Penns ; and that accomplished, he was willing to convey to O. Ormsby his title to the land, upon being released

from the payment of the balance of the purchase-money, after Penns' judgment was paid. Mr. O. Ormsby agreed to take the land from him, at the price he had paid for it. Who were defrauded? The heirs of John Ormsby? By whom? Mr. Ross expressly says, that O. Ormsby was not present at the sale, that he was away from home, and when he returned, he told him of it; he also says, that, at the time of the sale, his intention was, and he said, at the time the property was sold, if Mr. Ormsby or any other of his family was able to redeem it, he might have it, on the payment of the money. At that period, these lots were of very little comparative value; and perhaps, O. Ormsby was the only individual who would have given for them the price at which they sold at sheriff's sale.

O. Ormsby gave his receipt to the sheriff for the balance of the purchase-money, after the payment of the lien for which the land was sold, thus charging himself as administrator, and his surety in the administration bond, with this money, for which he was accountable to the heirs. Under the facts of this case, it is quite impossible, that there could have been fraud on the part of O. Ormsby alone; if fraud were committed, James Ross must have been a party to it; for, if he were a *bonâ fide* purchaser of the land at sheriff's sale, all idea of fraud, subsequently committed, is out of the question; for O. Ormsby never had one trait of the character of a trustee with respect to this land. The conveyance by James Ross to him, is absolute, and unqualified by any trust; and it is not pretended to be shown, that O. Ormsby purchased the land in trust for the plaintiff. It was pertinently *remarked by the court below, in their charge to the jury: "Suppose, the property had depreciated in value, after he received the conveyance from Mr. Ross, would he have been permitted, under the circumstances disclosed, to cast it upon the estate of John Ormsby, and to cancel his liability arising from his receipt to the sheriff? But the claim of the plaintiff is founded upon an alleged fraud of O. Ormsby; and the answer to it is, that it most manifestly appears, that, before he did one act, or uttered one syllable in relation to the land in controversy, there was an indefeasible legal title vested in James Ross, by a judicial sale. O. Ormsby was bound by no legal or moral obligation to accept James Ross's offer to permit him to redeem; and if he did accept it, it was upon the terms mentioned in the deed, by which the transaction was consummated and the title vested in him." [*21

But it is said, that a number of lots were levied on in mass, and so sold, instead of having been separated. What had O. Ormsby to do with that? If heirs or creditors were injuriously affected by it, their remedy was to apply to the court to set the sale aside; but that was not done: nor have the defendants, upon the trial of this cause, pretended to prove that the lots were worth one dollar more than the price for which they sold.

The question of fraud, being a matter of fact, was distinctly submitted to the jury by the court; and they have found against the allegation.

McLean, Justice, delivered the opinion of the court.—An action of ejectment was brought in the western district of Pennsylvania, by the plaintiffs, against the defendants, to recover the land in controversy. Both parties claim by descent from John Ormsby, sen., who died in Allegheny county, Pennsylvania, in December 1805. The deceased had a son, Oliver,

who survived him, and who administered on his estate; and a daughter, Sidney, who married Isaac Gregg. He had also a son called John Ormsby, jun., who married in the Mississippi country, and died in August 1795. Mary Swayze, the wife of the plaintiff, is the daughter of this son; and was an infant at his decease.

In December 1807, Oliver Ormsby gave bond, as administrator of his father; but it seems he filed no inventory of the personal estate, as the law required, nor did he ever settle his administration account. On the 6th
*22] September 1826, as administrator, he confessed a *judgment for $467.64, in favor of Messrs. Penns, Mr. James Ross acting as the attorney of the plaintiffs. An execution was issued on this judgment, and the premises were sold to Mr. Ross for $3000. He declared, publicly, at the sale, that Ormsby or any of his family might redeem the land, at any time, on the payment of "debt and interest;" and Mr. Ross further states, that before the sale, Mr. Ormsby was informed, that he only wanted the money on the judgment, and that he did not intend to buy the land, to hold it. No money was paid by Mr. Ross at the sheriff's sale, or at the time he received the sheriff's deed. Ormsby remained in possession of the land, receiving the rents and profits; and in April 1831, four years after the sheriff's sale, he paid Ross $523, the amount of the judgment and interest; and received from him a conveyance of the land. At this time, Ormsby receipted to the sheriff, as administrator, for the balance of the $3000, after deducting the amount paid to Ross. The sheriff's deed to Ross, and the deed from him to Ormsby, were recorded on the same day.

The land in controversy consists of eighteen coal-hill lots near Pittsburgh, and thirty-five acres adjoining them, which is now of great value; and was worth a large sum, at the time of the sheriff's sale.

There was a letter in evidence, written by Oliver Ormsby to Mrs. Swayze, dated 19th March 1828, at Natchez, in which he says: "My father, at his death, was not possessed of more property than a sufficiency to pay his debts; having from time to time, sold to individuals, and conveyed to his children." And there was evidence conducing to show, that the sale of two of the lots would have satisfied the judgment.

On these facts, and others in the case, the counsel for the plaintiffs prayed the court to instruct the jury, that, "in matters of fraud, courts of law and chancery have a concurrent jurisdiction. It is, therefore, within the province of the jury to inquire, whether the conduct and proceedings of Oliver Ormsby, whereby the legal title to the property in dispute became vested in himself, for his exclusive use and benefit, were in fraud of his co-tenant, Mary Swayze; and if they were, the verdict ought to be for the plaintiffs." This instruction was given, as requested, with this qualification, "that the fraud should be brought to the knowledge of Mr. Ross;
*23] and that, if he took a valid title under the sheriff's deed, the title of *his vendee would be good, under the circumstances disclosed in evidence." To the refusal of the instruction, as requested, and the instruction as given, an exception was taken; which raises the question of law, whether, to render the title of Ormsby, as set up by the defendants, inoperative and void, it is essential, that Ross should have participated in the fraud.

The charge of the judge was explicit on this point. He not only

instructed the jury, that, to make the title of Ormsby fraudulent, Ross must have had a knowledge of the fraud; but assuming, it would seem, the province of the jury, he declared that the fairness of the transaction was above suspicion.

That fraud is cognisable in a court of law, as well as in a court of equity, is a well-established principle. It has been often so ruled in this court. As there is no court of chancery, under the laws of Pennsylvania, an action of ejectment is sustained, on an equitable title, by the courts of that state. Such is not the practice in the courts of the United States; and in this case, if the plaintiffs fail to show a paramount legal title in themselves, they cannot recover.

It is unnecessary to inquire, whether, under the circumstances, Ormsby did not receive the conveyance of the land from Ross, in trust for the heirs of his father generally. This inquiry would be appropriate in the exercise of a chancery jurisdiction, on a bill framed for the purpose. But the jury were limited to the question of fraud. The deed by the sheriff to Ross, and the one from him to Ormsby, contain upon their face all the requisites of legal conveyances; and they must be operative to convey the title, unless the circumstances under which they were executed make them void.

In 1807, Ormsby took out letters of administration; but he seems to have acted, in the management of the estate, without regard to the law, or the obligations of his administration bond—he filed no inventory, made no settlement of his accounts. In 1825, he promised to pay the debt in the hands of Ross, but he took no step to fulfil this promise. It was his duty, as administrator, to make application to the orphans' court for authority to sell as much of the real estate as would pay the debt; but, to obtain this order, it would have been necessary to show that the personal assets were exhausted. In 1826, he confessed a judgment, and suffered an execution to be taken out, and the property in controversy to be sold. He remained *in the undisturbed possession of the property, enjoying the rents and profits; and then received a conveyance of the land from Ross, on [*24 the payment of the judgment, and receipting to the sheriff for the balance of the purchase-money. And prior to this time, by his letters, he informs Mrs. Swayze, who lived in Mississippi, and still resides there, that the property left by his father would all be consumed in the payment of debts.

In deciding the question of law raised by the exception, it may not be proper for this court to say, whether these facts do not show fraud in the administrator. The facts were properly before the jury, and it was for them to determine the question of fraud. But, may Ormsby and his representatives hold the land under their deed, unless it shall be shown that Ross participated in the fraud?

A *bonâ fide* purchaser, without notice, is not affected by the fraud of his grantor; and it is admitted, that a conveyance by such purchaser, to a person who may have knowledge of the fraud, would be valid. But the purchase and conveyance of Ross, cannot be considered as coming within this rule. In the first place, Ross did not purchase, with the intention of holding the property. This was declared publicly at the sale; and some time before it took place, the same determination was made known by him to the administrator. And, in the second place, it appears the purchase was never perfected by Ross. He received the sheriff's deed, but he paid no part of

the consideration. In this state the matter remained four years; and until the administrator paid the judgment, and receipted to the sheriff for the residue of the purchase-money. On this payment, he received a deed from Ross; and then he caused the sheriff's deed to be placed on record. In making the purchase, Ross seems to have had no design to aid the administrator in the perpetration of a fraud, if such were his intention; or to defeat or embarrass the claims of the heirs of John Ormsby, sen. By the proceeding, he was desirous of securing the debt placed in his hands for collection; and for the payment of which he felt himself personally responsible. The judgment, and the sale of the land, secured the desired object. It might have been secured by the judgment only. The purchase, at the sheriff's sale, was not made by Ross, on his own account, or for the benefit of the plaintiffs in the judgment. Having fixed a lien on the land by the judgment and sale, he did not desire to complete his purchase by the payment of the money. *And it is clear, that a purchaser at sheriff's sale, cannot protect himself against a prior claim, of which he had no notice; or be held a *bonâ fide* purchaser, unless he shall have paid the money.

*25]

Had the administrator, under the circumstances of this case, become the purchaser at the sheriff's sale, could he have held the land, as a *bonâ fide* purchaser? His omission of duty, in failing to account for any assets which may have come into his possession, and his neglect to apply to the orphans' court, for authority to sell a part of the real estate to pay the debt, connected with the judgment and the proceedings under it, are facts from which a jury might, in the exercise of their judgment, have inferred fraud. Had the administrator fraudulently furnished an agent with money, and employed him to purchase at the sheriff's sale, could a title thus acquired be held valid against the heirs of John Ormsby, sen., though the deed might have been made to the agent? The agent may be supposed to have been made the innocent instrument of fraud, by the administrator; and whether the title apparently remained in the agent, or had been conveyed to the administrator, could not the fraud be inquired into at law? There may not have been, in terms, an agreement between Ross and the administrator, that the purchase should be made at the sheriff's sale, by the former, as agent of the latter. But, before the sale, the administrator was assured by Ross, that he would not purchase to hold the land; and his high character was a sufficient guarantee on the subject; and may not this conduce somewhat to show to a jury why the eighteen lots, and the thirty-five acres adjoining, were sold on the execution, when the sale of two or three of the lots would, probably, have satisfied the judgment? The money was paid by the administrator.

In making the purchase, Ross seems, in effect, to have acted as the agent of the administrator; and it was proper for the jury to inquire, whether the transaction was not fraudulent. If the administrator suffered the land to be sold, through the agency of Ross, with the view of securing the title to himself, to the exclusion of the other heirs of his father, the proceeding was fraudulent and void. And as Ross could not be considered a *bonâ fide* purchaser, against the legal and equitable right of the plaintiffs, he not having paid the purchase-money; the deed which he executed to Ormsby is not a *bonâ fide* conveyance. Had the plaintiffs brought their action against

Ross, he could not have defended himself, under the sheriff's deed: *without showing the payment of the consideration. Nor is this deed a good defence against the right of the plaintiffs, under the circumstances of the case, when set up by Oliver Ormsby or his representatives. To the objection already stated to the title of Ross, may be superadded all the circumstances going to show fraud in the administrator; and of which the jury are the proper judges. [*26

We think, therefore, that the judge erred in charging the jury that the deed to Ormsby was valid, unless they should find that Ross participated in the fraud; and on this ground, the judgment of the court below is reversed, and the cause remanded for further proceedings.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Pennsylvania, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the district court be and the same is hereby reversed; and that this case be and the same is hereby remanded to the said district court, with instructions to award a *venire facias de novo*.

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*Nathaniel S. Benton, District-Attorney of the United States for the Northern District of New York, *v.* Melancthon T. Woolsey, The Bank of Utica, *et al.* [*27

Practice.

The district-attorney of the United States filed an information in his own name, in behalf of the United States, in the district court for the northern district of New York, to enforce a mortgage given to the United States, by Woolsey, one of the defendants. This form of proceeding had been for a long time used, without objection, in the courts of the United States, in New York; and was doubtless borrowed from the form used in analogous cases, in the courts of the state of New York, where the state itself was the plaintiff in the suit: the United States may be considered as the real party, although, in form, it is the information and complaint of the district-attorney.

It is certainly desirable that the practice should be uniform in the courts of the United States; and that, in all suits where the United States are the real plaintiffs, the proceeding should be in their name; unless it is otherwise ordered by act of congress.

Appeal from the District Court for the Northern District of New York. The district-attorney of the United States for the northern district, filed in the district court, an information on behalf of the United States, for the purpose of foreclosing a mortgage executed by Melancthon T. Woolsey to the United States, in July 1825, as a security for the payment of a debt due by him to the United States, in one year after its date. The mortgage comprehended land in the county of Jefferson, and in the county of St. Lawrence, New York; it was recorded in Jefferson county, on the 26th day of November 1830, and in the county of St. Lawrence, on the 10th of June 1831.

The bank of Utica had obtained a judgment against Melancthon T. Woolsey, in the supreme court of New York, on the 17th of October 1816, for $16,000, which judgment was docketed on the 24th of November 1817. No execution was issued on this judgment until it was revived by a *scire facias*, on the 9th July 1828. A *fieri facias* was then issued on the judg-

ment, and the lands mortgaged to the United States were sold to satisfy the debt, and were purchased by the Bank of Utica, to whom they were conveyed by the sheriff on the 3d May 1830. The lands in *St. Lawrence county were sold by the sheriff, January 30th, 1829, and conveyed to the Bank of Utica, on the 15th May 1830, having been purchased by the bank.

*28]

By the law of New York, the judgments in favor of the Bank of Utica, ceased to be a lien on the lands of Woolsey, after ten years, against *bonâ fide* purchasers and subsequent incumbrancers; and the district-attorney, on behalf of the United States, claimed the operation of the mortgage to the United States, so as to exclude the claim of the bank, under the judgment upon which the land was sold, and purchased by the bank to satisfy their debt. No money was paid by the bank, at the time of the purchase, except the expenses attending the proceedings against the land; but the bank claimed to hold the land as a *bonâ fide* purchaser, the property having been bought to satisfy the debt due on the judgment, and without notice of the mortgage to the United States; it not having been put on record, until after the proceedings under the judgment. The district court made a decree in favor of the defendants, and the plaintiff appealed to this court.

The questions arising on this case were argued at large, in printed arguments, by *Butler*, Attorney-General, for the United States; and by *Beardsley*, for the defendants.

The judgment of the district court was affirmed, by a divided court; and no opinion was given on any of the questions raised and argued in the cause; except upon a question of jurisdiction. Mr. Justice Thompson did not sit in the cause, being connected with one of the parties. The court intimated a doubt of their jurisdiction in the case, as the district-attorney had instituted the suit in his own name.

Upon this question, Mr. *Butler*, the Attorney-General, said:—That the bill represents a case, in which the United States are exclusively the parties complainants; and the appeal is taken by the district-attorney, as prosecuting for the United States. The United States are the only parties, and the district-attorney has no interest in the cause. The court will not look, particularly, at forms, when the substance of the case is manifestly within its jurisdiction. The judiciary act gives jurisdiction to the courts of the United States, in all cases in which the United States are parties. It is then *submitted, that as the interest in the suit is entirely in the United States, the court will consider the case as if brought in the name of the United States.

*29]

The rules of practice in the courts of chancery, in England, are the rules established for the government of suits in chancery in the courts of the United States; where those rules are silent, the practice of the state courts is resorted to. In the courts of New York, it is the practice to file bills in the name of the attorney-general, in cases in which the state of New York is interested. In one instance, in the circuit court of the southern district of New York, this practice was adopted. Cited, 33d Rule of Practice of the Circuit Courts in proceedings in Chancery; Newland's Practice 55.

It is admitted, that no officer of the United States can be sued as such;

nor can he, without the authority of an act of congress, institute a suit. But this does not apply in admiralty cases, or in cases in equity; where the United States, being interested, the law-officer of the United States often interposes. In the case of *Brown* v. *Strode*, 5 Cranch 303, it was held, that the courts of the United States have jurisdiction in a case, in which citizens of the United States are but nominal plaintiffs, for the use of an alien. On the authority of this case, and of the practice of the courts of the state of New York, the jurisdiction of the court is claimed. The district-attorney is but a nominal party.

Beardsley, for the defendants, said, no wish was entertained to prevent the court taking jurisdiction of the case.

TANEY, Ch. J., delivered the opinion of the court.—In this case, a bill of information and complaint was filed by the district-attorney of the United States, in behalf of the United States, in the district court for the northern district of New York, against Melancthon T. Woolsey, the Bank of Utica and others, for the purpose of foreclosing a mortgage upon certain real property, executed by the said Woolsey to the United States, on the 20th of July 1825, to secure the payment of $29,459.29, in one year from the date, with interest. The property mortgaged was situated partly in the county of Jefferson, and partly in the county of St. Lawrence, in the state of New York; and the mortgage was recorded in the county *of [*30
Jefferson, November 26th, 1830, and in the county of St. Lawrence, June 10th, 1831.

It appears, from the answer and evidence, that the Bank of Utica obtained a judgment in the supreme court of the state of New York, against the said Woolsey, on the 7th of October 1817, for $16,000; and the judgment was docketed November 24th, 1817. No further proceedings were had upon it, until May term 1828, when it was revived by *scire facias*, and the judgment on the *scire facias* docketed July 9th, 1828. Process of *fieri facias* issued on this judgment, indorsed to levy $6667.50; and the lands mortgaged to the United States, in Jefferson county, were sold by the sheriff, on the 24th of November 1828; and (with the exception of a small parcel) purchased by the bank. They were conveyed by the sheriff to the bank, May 3d, 1830. The lands in St. Lawrence county, mortgaged to the United States, were sold by the sheriff, January 30th, 1829; and conveyed by the sheriff to the bank, May 15th, 1830. The judgment obtained by the bank, in 1817, after the expiration of ten years from the time it was docketed, ceased, by the laws of New York, to be a lien upon real estate, against *bonâ fide* purchasers, or subsequent incumbrancers, by mortgage, judgment, or otherwise; and, consequently, after the 24th of November 1827, it no longer bound the property of Woolsey.

The bank denies, in its answer, that it had notice of the mortgage in question, at the time it purchased and obtained the conveyances; and there is no evidence in the record to charge them with notice. It purchased and obtained the deeds, as above stated, before the mortgage was recorded. No money was paid by the bank, on the purchase, except for expenses of sale and costs. The property was bought to secure the debt due from Woolsey; and the bank claims, by reason of that debt, to be a *bonâ fide* purchaser, for a valuable consideration; and having had no notice of the mortgage to

the United States, it insists, that it is entitled to hold the lands discharged of the mortgage.

Some doubts were at first entertained by the court, whether this proceeding could be sustained in the form adopted by the district-attorney. It is a bill of information and complaint, in the name of the district-attorney, in behalf of the United States. But, upon carefully examining the bill, it
*31] appears to be, in substance, a *proceeding by the United States; although, in form, it is in the name of the officer. And we find that this form of proceeding, in such cases, has been for a long time used, without objection, in the courts of the United States, held in the state of New York; and was doubtless borrowed from the form used in analogous cases in the courts of the state, where the state itself was the plaintiff in the suit. No objection has been made to it, either in the court below, or in this court, on the part of the defendants; and we think the United States may be considered as the real party; although in form, it is the information and complaint of the district-attorney. But although we have come to the conclusion that the proceeding is valid, and ought to be sustained by the court, it is certainly desirable that the practice should be uniform in the courts of the United States; and that, in all suits where the United States are the real plaintiffs, the proceeding should be in their name, unless it is otherwise ordered by act of congress.

Considering the United States as the real party in the case, the question to be decided by this court is, whether, under the act of the state of New York, concerning judgments and executions, passed April 2d, 1813, the Bank of Utica was a *bonâ fide* purchaser at the sheriff's sale hereinbefore mentioned; the purchase being made, not upon an advance of the purchase-money, but to pay a precedent debt due to the bank by judgment. This question has been fully argued and carefully considered by this court. But no opinion can be pronounced on the point, because the judges are equally divided upon it. Upon this division, the judgment of the court below is necessarily affirmed.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the northern district of New York, and was argued by counsel: On consideration whereof, it is adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed.

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*32] *Bank of the United States, Appellants, *v.* James Daniel *et al.*, Appellees.

Appellate jurisdiction.—State decisions.—Bills of exchange.—Mistake of law.—Statute of limitations.

A bill of exchange for $10,000 was drawn, at Lexington, Kentucky, on James Daniel, on the 12th of October 1818, by Robert Griffing, payable at 120 days after date, at the bank of deposit of New Orleans, the bill was accepted by the drawee, and was indorsed by H. D., I. C. and S. H.; all the parties to the bill resided in Kentucky. The bill was discounted by the branch Bank of the United States, in Kentucky, and was transmitted to New Orleans for payment; it was there regularly protested for non-payment, and was returned to Kentucky for payment of principal and interest, from the 9th of February 1819, the time it fell due, together with charges of pro-

test, and ten per cent. damages on the principal. The drawer and acceptor of the bill paid the bank, in July 1819, $3330.67, on account of the aggregate amount due, and supposed to be due, and gave a promissory note for $8000, the balance, to William Armstrong, to which H. D., I. C. and S. H. were parties, as co-makers or indorsers; this note was discounted at the office of discount of the Bank of the United States, at Lexington, Kentucky, upon the express agreement, that the proceeds should be applied to the payment of the balance due on the bill; afterwards, a payment of $500 was made on this note, and a note for $7500 given, which not being paid, and Griffing having died, suit was brought by the bank on the note, and a judgment obtained against all the other parties to it. In 1827, the defendants in the judgment at law filed their bill in the circuit court of Kentucky, claiming, that by the law of Kentucky, the bank was not entitled to ten per cent. damages on the bill, as all the parties to it lived in Kentucky; and that, therefore, the amount of the damages, $1000, had been included by mistake, in the note for $8000; and as there was no legal liability for damages, the note, to the amount of the damages, was given without any consideration whatever; the bill prayed for an injunction to stay proceedings on the judgment, to the amount of the damages, and the interest on the same; in 1827, that amount was $1515. A decree of the circuit court of Kentucky allowed the injunction, at November term 1836, and the amount of the damages and interest from July 1819, which the $3330.67 included, and was paid in that sum, was, at the time of the decree of the circuit court, $2040.

The act of congress provides, that appeals shall be allowed to the supreme court, from the final decrees rendered in the circuit courts, in cases of equity jurisdiction, where the matter in dispute, exclusive of costs, shall exceed the sum or value of $2000. The expression, sum or value of the matter in dispute, has reference to the date of the decree below, alike in case of appeals in equity, and writs of error at law; they are each grounded on the original process of this court, operating on the final decree or judgment; and are limited to the sum or value then in controversy, and of which the decree or judgment furnishes the better evidence, should it furnish any. The matter in dispute in the circuit court, was a claim to have deducted from the judgment at law, $1000 with interest thereon, after the rate of six per centum, from the 8th day of July 1819, up to the date of the decree, in November 1836; being upwards of seventeen *years; and the circuit court decreed the reformation to be made of the judgment [*33
at law, by expunging therefrom, and as of its date, the $1000, with the interest; the effect was, to cut off the interest that had accrued on the $1000, from the date of the judgment in 1827, to that of the decree in 1836; interest on the principal sum recovered, being an incident of the contract by the laws of Kentucky, as well after judgment as before. The practical consequence of the decree will immediately be manifest, when the bill is dismissed by the order of this court; the appellants will then issue their execution at law, and enforce the $1000 with the accruing interest, from the 8th of July 1819, until payment is made; it follows, that upon the most favorable basis of calculation, and disregarding the statute of Kentucky of 1789, giving ten per cent. damages, in addition to legal interest, on the sum enjoined, the amount to which the decree below relieved the appellees, and deprived the bank of the right of recovery, was $2040; that is, $1000 principal, with seventeen years and four months of interest: this being the aggregate amount in dispute, and enjoined by the decree, of course, the supreme court has jurisdiction of the writ of error.[1]

This court, in accordance to a steady course of decision for many years, feels it to be an incumbent duty, carefully to examine and ascertain if there be a settled construction by the state courts of the statutes of the respective states, where they are exclusively in force; and to abide by, and follow, such construction, when found to be settled.

A bill of exchange drawn, accepted and indorsed by citizens of Kentucky, and there negotiated, payable at New Orleans, was not, by force of the statute of Kentucky of 1798, subject to the payment of ten per cent. damages.

Whether a bill of exchange, drawn in one state of this Union, payable in another, is a foreign bill, involves political considerations of some delicacy, although of no intrinsic difficulty, at this day. The respective states are sovereign within their own limits, and foreign to each other, regarding them as local governments; and consequently, foreign to each other in regard to the regulation of contracts:[2] it follows, a bill drawn in one, payable in the other, is a foreign bill

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[1] S. P. Godfrey *v.* Gilmartin, 2 Bl. C. C. 340; The Patapsco, 12 Wall. 451; The Rio Grande, 19 Id. 178.

[2] Bank of Augusta *v.* Earle, 13 Pet. 520; Dodge *v.* Woolsey, 18 How. 350–51.

The place of payment of the bill, on which the suit was brought in the circuit court, being within a jurisdiction foreign to Kentucky, subjected the acceptor to the performance of the contract according to the laws of Louisiana, where it was payable, to every extent he would have been, had he become a party to the bill at New Orleans; and the effect of the contract, on all the parties to it, does not vary from the one sued on in Buckner *v.* Finley, 2 Pet. 586. Being a foreign bill, and not having been affected by the statute of Kentucky, of course, the holders, by commercial usage, were entitled to re-exchange, when the protest for non-payment was made.

Courts of chancery will not relieve for mere mistakes of law; this rule is well established, and the court will only repeat what was said in the case of Hunt *v.* Rousmanier, 1 Pet. 15, "that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character, and to involve other elements of decision."[1]

Courts of equity are no more exempt from obedience to statutes of limitation, than courts of common law.

It is generally true, that the giving of a note for a pre-existing debt, does not discharge the original cause of action; unless it be agreed, that the notes shall be taken in payment.

*34] The statute of limitations is a bar, in a case where, at the time of the return of a bill *of exchange, payable in New Orleans, and drawn in Kentucky, protested for non-payment, the parties to it, in 1819, paid as damages, on the bill, ten per centum on the amount; and did not, until 1827, claim that, by the law of Kentucky, no damages were payable on such a bill. In 1819, the parties to the bill paid $3330.67 on account of the bill for $10,000, the cost of protest, and damages; and gave their note for $8000, for the balance of the bill, which was discounted, and the proceeds, by express agreement, applied to the payment of the bill. If no damages were payable on the bill for $10,000, an action to recover back the same, as included in the payment of the $3330.67, could have been instituted in 1829.

Appeal from the Circuit Court of Kentucky. On the 29th day of October 1827, the appellees, James Daniel, Henry Daniel, Isaac Cunningham and Samuel Hanson, filed a bill in the circuit court of Kentucky, stating, that on the 12th of October 1818, at Lexington, Kentucky, Robert Griffing, since dead, drew a bill of exchange on James Daniel, one of the complainants, for $10,000, payable 120 days after date, at the office of discount and deposit of the Bank of the United States, at New Orleans. The bill was drawn in favor of Henry Daniel, Isaac Cunningham and Samuel Hanson, and being accepted by James Daniel, was indorsed to the Bank of the United States by the payees. At the time the bill was drawn, Robert Griffing and James Daniel lived and were in the state of Kentucky; and all the parties to the bill were, at the time it was drawn, and ever since had continued to be, residents in that state.

The bill of exchange, so drawn and indorsed, was, by the Bank of the United States, transmitted to New Orleans, and not being paid, was regularly protested and returned to Kentucky; the holders claiming the amount of the same from the parties to the bill, with damages, at the rate of ten per cent. on the amount. James Daniel, the acceptor of the bill, believing the demand of damages to be legal, paid to the Bank of the United States, in June or July 1819, $3330.67, on account of the whole amount due on the bill, consisting of principal, interest, charges and the damages; and for the balance of the bill, the drawers of the bill, Robert Griffing and James Daniel, gave their negotiable note, payable sixty days after date, with Cunningham, Hanson and Henry Daniel, as co-makers, in favor of William Armstrong, which note was discounted by the bank, and the proceeds, by

[1] The rule that a mistake of law does not avail, prevails in equity as well as at common law. Upton *v.* Trebelcock, 91 U. S. 50; Robinson *v.* Cathcart, 2 Cr. C. C. 590; s. c., 3 Id. 377; Chesapeake and Ohio Canal Co. *v.* Dulany, 4 Id. 85.

*express agreement, were appropriated to the payment of the balance due on the bill of exchange. The sum of $3330.67, and the note for $8000, were delivered to the bank at the same time; and all the complainants, except James Daniel, were only sureties for the payment of the note, having become co-makers of the same for that purpose only. In August 1820, Griffing and the complainants, gave another note to the Bank of the United States, for $7500, Griffing and James Daniel having paid $500 on account of the first note; and the note for $7500 having become due and protested, a suit was instituted on it and a judgment obtained, on the law side of the circuit court of the United States for the Kentucky district.

The bill stated, that the Bank of the United States were not entitled to damages on the bill of exchange payable at New Orleans, inasmuch as all the parties to it resided in the state of Kentucky, at the date and maturity thereof; and therefore, so much of the note for $8000, as included the ten per cent. on the bill, amounting to $1515, ought to be deducted from the judgment; and the bill, therefore, prayed that the defendant might be restrained by an injunction from collecting the said sum of $1515, part of the judgment; and that at a final hearing on the bill, the injunction might be made perpetual.

The circuit court, in November 1827, granted an injunction, according to the prayer of the bill, until further order. The defendants, in May 1836, having proceeded to answer the bill, stated, that $1000, being ten per cent. on the bill for $10,000, had been allowed, as damages, on the return of the bill from New Orleans, with a full knowledge of all the facts of the case and of all the principles of law on which the same was claimed. The respondents did not admit that this was done under a clear mistake of the law; indeed, two of the complainants were lawyers of celebrity, and deservedly of high rank; and no ignorance of the law could be imputed to them. The respondents alleged, that their claim to damages was within the provisions of the statute of Kentucky; and, if not so, they were entitled to damages to the amount, for the admitted non-payment of the draft at New Orleans; and they resisted the claim to set aside the allowance of damages fairly and voluntarily made by the complainants. *The respondents also said, that all the grounds of equity, alleged in the bill, occurred [*36 to the complainants more than five years next before the commencement of the suit, and were barred by lapse of time; and they further alleged, that the damages were liquidated, assented to, and discharged, more than five years next before the commencement of this suit; and all claim to relief, on account of the same, was, therefore, barred by the statute of limitation.

The cause came on for a final hearing, in November 1836, and the circuit court decreed, that the plaintiffs be perpetually enjoined from taking out execution for the sum of $1000, the amount of damages charged on the bill, with the interest charged on the said sum of $1000, up to the time of the judgment. The defendants appealed from this decree.

The case was submitted to the court, on printed arguments, by *R. Wickliffe* and *Johnson*, for the appellants; and by *Ousley*, *Turner* and *Allen*, for the defendants.

For the *appellants*, it was contended, in the argument of their counsel,

that the decree of the circuit court was erroneous, on the following grounds: 1. Because the complainants were liable to ten per cent. damages under the statute of Kentucky. 2. They were liable to damages, under the law-merchant, independently of that statute. 3. Their agreement, upon a full knowledge of all the facts, to pay these damages, is binding; and they cannot be relieved, on account of their mistake of law.

1. In 1819, when the agreement was made to pay the damages, the statute of Kentucky had not received a judicial construction. Two decisions have since been given upon it; but, at that time, the parties were left to their own interpretation, with such light as the words, the spirit and the object of the statute afforded. This interpretation, the complainants contend, is shown to be erroneous, by these subsequent decisions. On the question of mistake, we conceive it proper that this court should look to the same lights the parties themselves had, and refuse relief, unless it shall appear they did, in truth, commit an error. The question is not, what the courts have since decided, but whether the parties, in 1819, mistook the law, when they believed this bill bore damages. Were it purely a question of
*37] the *construction of a Kentucky statute, we admit, the Kentucky decision, however erroneous, would be followed. But the question is one of mistake, and no decision can have such retrospective power, as to convert what was once truth into falsehood. It would be as mischievous as an *ex post facto* law, to permit a subsequent decision to overturn the fair compromises and contracts of individuals, made under a different and a correct view of law. If there was mistake, the mistake was committed in 1819; if right to relief exists, it existed as early as 1819. Now, if the court regard these subsequent decisions as conclusive, then they will, in substance, decide, that, although no mistake existed when the contract was made, and at that time the agreement was fair and binding; yet some two years afterwards, a Kentucky decision created a mistake, and annulled a previous contract that was legal and valid. Under our constitution, no statute can have such a power of dissolving the obligation of contracts, and certainly, a decision cannot go higher. We believe, then, we may safely conclude, that the complainants cannot show a mistake as early as 1819; or, in other words, must show it by the true construction of the statute itself, giving to these decisions the weight they deserve, and no more.

The statute is in these words, viz: "If any person or persons shall draw any bill or bills of exchange, upon any person or persons, out of this state, on any other person or persons, within any other of the United States of North America, and the same being returned back unpaid, with legal protest, the drawer thereof, and all others concerned, shall pay the contents of the said bill, together with legal interest from the time said bill was protested, the charges of protest, and ten pounds per cent. advance for the damages thereof, and so proportionably for greater or smaller sums."

The complainants contend, that as James Daniel, the drawee, was a citizen and resident of Kentucky, at the drawing and negotiating of the bill, it did not come within the statute, and make them liable to damages. The bill was payable out of Kentucky, and there was no designation on the bill of the residence of James Daniel, other than that of the place of payment. These circumstances, we contend, bring it within the meaning of the statute, and we regard James Daniel, as drawn upon, at the place where the bill was

payable; which place, being out of Kentucky, brings it to this, that he was drawn on, out of that state. It will be observed, that the statute does not make the damages depend upon the residence of the drawee; and it has been decided in *Kentucky, that the residence is immaterial. If it neither depends upon the residence, nor place of payment, the question of damages, under this statute, must be determined by the mere casual locality of the drawee, as in or out of Kentucky, at the time of drawing the bill. The locality of individuals in the West is extremely transitory, and difficult of being exactly known at any given time. If the damages be made to turn upon that fact, it would frequently happen, that damages would be incurred where none were expected by either party. For instance, a bill might be drawn upon an individual, supposed to be in Louisville or Maysville, who happened, however, at the time, to be across the Ohio river, and of course, out of the state of Kentucky; or it might be drawn, payable in Kentucky, and the drawee out of the state; in both these cases, the bill would bear ten per cent. damages. Yet the parties could not have contemplated such a result; nor would the cases come within the mischief the statute was intended to remedy. Such a construction, then, leads too far; it involves us in absurdities. There is a wide difference between the actual locality of an individual, and the locality given to him by the bill of exchange. The former is a matter entirely immaterial, so far as the bill of exchange is concerned; it has nothing to do with the damages sustained by the holder, on the non-payment of the bill. With the latter, it is otherwise. Had the courts of Kentucky duly considered this distinction; had they attended to the mercantile language of this statute, and the mischiefs it was intended to remedy, instead of looking to its bare letter and grammar; we believe, no difficulty would have arisen in its construction. [*38

Where no place of payment is designated in the bill of exchange, it is presentable for acceptance and payment at the residence of the drawee. Such a bill is drawn on the drawee, at his residence; and if that be out of Kentucky, the bill is, both in letter and spirit, within the statute. Here, the actual locality of the drawee is unimportant; the bill fixes his locality, at his residence, by its being the place for acceptance and payment. When a place of payment is fixed by the bill, both the actual residence and locality of the drawee become immaterial; the bill fixes his locality, at the place of payment, and there alone is he to be sought. It becomes the place of presentment for acceptance and payment; and the drawer and indorsers contract, by the bill, that the drawee shall there be found, for all the purposes of the bill. In the language of merchants, the drawee is drawn upon at that place; and, if the place be out of the state, he is drawn upon out of *the state, and comes within the statute. Cited, *Wood* v. *Farmers' and Mechanics' Bank of Lexington*, 7 T. B. Monr. 284; *Clay* v. *Hopkins*, 3 A. K. Marsh. 488. [*39

2. The bank claims these damages, independently of the Kentucky statute. It cannot be denied, that this bill comes within the spirit, if, indeed, it be out of the letter of the statute. This was conceded in the case of *Clay* v. *Hopkins*. As we have before remarked, these statutory damages were given, not as a penalty, but as compensation for real injury and loss sustained by the holder, from the non-payment of the bill at the place stipulated; and came in lieu of the damages given by the law-merchant, in the

form of re-exchange, commission and expenses. It is presumable, the legislature fixed a reasonable rate of compensation ; and it would not be too much to say, the damages more frequently were below than above the real injury and loss. Now, it surely cannot be illegal for the parties to agree between themselves the amount of compensation for this injury ; nor contrary to law to fix that amount at the same that the law has fixed for exactly similar injuries. In this case, the place of payment was at the extreme limit of the United States ; and the injury the greatest that could occur under the statute. The complainants seem to have forgotten entirely the law-merchant, and not to have remembered, that there was real loss to be compensated. Under these circumstances, we conceive the standard fixed by law, cannot be against law ; and an agreement in pursuance of it, is, upon valuable consideration, fair and binding.

3. Their agreement, upon a full knowledge of all the facts, to pay these damages, is binding ; and they cannot be relieved, on account of their mistake of law. How far a mistake of law will invalidate a contract, and form a ground of relief in chancery, has never been very clearly settled. In Mr. Story's Commentaries on Equity, vol. 1, § 121–54, will be found an able and full discussion of the question. The English and American decisions are collated and examined, and the views of the civilians adverted to. The result of his researches and examinations was, that a mistake or ignorance of law, forms no ground of relief from contracts fairly entered into, with a full knowledge of all the facts. There may be some exceptions, but the cases are few, and generally stand upon some urgent pressure of circumstances. The same doctrine is expressed by the supreme court of the United States, in the case of *Hunt* v. *Rousmaniere*, 1 Pet. 1–15, where the court remarks: "We hold the general rule to be, that a mistake *of this character (a mistake of law) is not a ground for reforming a deed founded on such mistake ; and whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character."

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The few cases which form exceptions to the rule, will usually be found to contain some other ingredient than mere mistake or ignorance ; such as surprise, undue influence or oppression : and where such ingredient is wanting, the mistake has been one of a plain well-settled principle of law. Mr. Story well remarks, that it is difficult to define what are plain acknowledged principles of law, and what will constitute a doubtful question. Yet it may be considered, that a claim founded on a doubtful or doubted question of law, forms a good consideration for any contract concerning that claim ; and that such a contract, if otherwise unobjectionable, will be upheld.

Now, of all the questions and difficulties which the law presents, there is none of more admitted uncertainty than the construction of statutes. It is often impossible for the best lawyer, upon the calmest and most attentive investigation, to determine the extent to which judicial construction will carry them. Sometimes, they are limited by the letter, at others extended by the spirit. For example, look to the statute of frauds and perjuries, and to the statute of limitations. They are plain and simple in their language, yet it has cost millions to give them a judicial construction. And when books had been written upon them, and the British courts had exhausted their learning and refinement, one or two Kentucky decisions destroyed, in

that state, the whole, or almost the whole, fabric of their judicial construction. We presume, however, it must be conceded, that the construction of this statute was at least a doubtful question of law. Of that there is abundant evidence in the opinion of the chief justice of Kentucky, and in the legislative construction of the act. At this time, were the question raised in the Kentucky courts, we believe it more than probable, the opinion of the chief justice would be considered law. Even there, at this time, it may be considered more than doubtful, whether any mistake has been committed.

But we not consider this a case of ordinary mistake of a point of law. The agreement was in exact accordance with the general understanding of the law, at the time it was made. Nine-tenths of the legal men in Kentucky would have pronounced the construction given by the parties correct. Two years afterwards, the court of appeals, in another case, gave a different construction. The community *would be in a miserable condition, if, at every change of opinion upon questions of law, all their previous [*41 contracts and settlements were to be overturned. Men could never know the end of their controversies, were such a rule to prevail. Upon this subject, the remarks of Chancellor KENT, whose decisions are almost reverenced throughout the Union, are so pertinent and just, that we could not do better than make a short extract from them : " A subsequent decision of a higher court, in a different case, giving a different exposition to a point of law from the one declared and known, when a settlement between parties takes place, cannot have a retrospective effect, and overturn such settlement. The courts do not undertake to relieve parties from their acts and deeds, fairly done, on a full knowledge of facts, though under a mistake of law. Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle which is safe and practicable, in the common intercourse of mankind. And to permit a subsequent judicial decision, in any one case, on a point of law, to open and annul everything that has been done in other cases of a like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences Fortunately, for the peace and happiness of mankind, no such pernicious precedent is to be found. The case is, therefore, to be decided according to the existing state of things, when the settlement in question took place." See *Lyon* v. *Richmond*, 2 Johns. Ch. 60.

Had the opinion been delivered in this very case, it could not have been more directly applicable. This case in not cited, because there are but few on the same point, but to show that it is the understanding of the law, prevailing at the time of the settlement or contract, even though it may have been erroneous, which is to govern ; and that the subsequent settlement of a question of law, by judicial decisions, does not create a mistake of law which courts will ever rectify.

As this court is governed by correct chancery law, and not the decisions of the Kentucky courts, it would almost seem needless, after the thorough and able examination contained in Story's Commentaries, above referred to, to cite further authorities. Yet it will be found, that the Kentucky decisions, on this point, are in accordance with the principles laid down by Mr. Story. In the case of *Patterson* v. *Hughes*, 2 A. K. Marsh. 331, it *is laid down, that a mistake of law, with a full knowledge of the [*42 facts, is no ground of relief. In the case of *Taylor* v. *Patrick*, 1 Bibb 168,

it is held, that if the parties to a compromise understand the facts correctly, erroneous deductions of law from those facts by a party, would not be ground for the setting aside the settlement induced by these deductions. In Tennessee, the same doctrine, as to mistakes of law, was established in the case of *Lewis* v. *Cooper*, Cooke 467. In Virginia, it was established in the case of *Brown* v. *Armstead*, 6 Rand. 594. In a late case in Kentucky (not yet reported), the court held, that relief for mistakes of law could only be granted, under the following circumstances: 1st. The mistake must be of a plain, well-settled principle of law; and 2d. The mistake must go to the whole consideration of the agreement; or, in other words, there must be no other consideration than the mistaken legal liability. If this case be law, of which there may be some doubt, it still settles the question against the complainants in this case. There was no plain well-settled principle of law which was mistaken; nor did the mistake, if any, go to the whole consideration. Besides the doubtfulness of the claim, which is a valuable consideration (see *Taylor* v. *Patrick*, 1 Bibb 168; also 2 Ibid. 450; 6 T. B. Monr. 91), there was also the liability of complainants to damages by the law-merchant, about which there could be no mistake.

On the subject of consideration, it was held by the supreme court of the United States, in the case of *Thornton* v. *Wynn*, 12 Wheat. 183, that if a indorser of a bill, who had been discharged from liability, by the *laches* of the holder in giving him notice, with a full knowledge of the facts, promises to pay the bill, his promise binds him. Here, there was no legal liability, but perhaps a moral one, to save the holder from loss. In our case, there was a legal and moral liability to compensate his loss.

We contend, the claim to relief is barred by lapse of time, although the statutes of imitation do not, in express terms, apply to suits in chancery; yet it is a well-settled rule, that equity will follow them, and not decree relief when, in similar cases, the statutes would have barred at law. Could, then, a suit have been brought at law; and if so, what length of time would have barred? From the allegations of the complainants, it appears, this bill of exchange, with the damages due upon it, were paid off, and the bill
*43] *surrendered up, in 1819. It is said *paid off*, because, by their own showing, it so appears. They did not pay part, and give their note for the balance; but they obtained a discount of a note executed to one Mr. Armstrong, and with the proceeds of the discount, paid off the whole balance of the bill. By discount, we understand a purchase, so that this Armstrong's note was sold or assigned to the bank, and with the price they received for it, the bill was paid. Now, if this be true, the parties could have brought an action of *assumpsit* against the bank, for money paid to it by mistake. This action accrued in 1819; and this suit was not brought until 1827, more than eight years after the right to relief accrued; for all actions of *assumpsit* in Kentucky, the limitation is five years. That, by the indulgence of the bank, this note was not paid off, is neither a legal, equitable nor moral answer to the statute. It began to run, from the time the settlement took place, and the mistake, if any, happened. Then the right accrued, if it ever did. Perhaps, however, it may be said, that the limitation should only run from the time of discovering the mistake. Admit it; the court of appeals gave their construction to the statute in 1821, six years before suit was brought. It is alleged also, that there was an express agreement, by

which the proceeds of the discount were to be applied to the payment of the bill. This agreement certainly does not prevent its being a payment; that it was agreed to be a payment, rather confirms than weakens the position that the bill was paid.

On the subject of the jurisdiction of this court, we would further remark that the decree directs $1000, with interest, from the time of allowing damages, to the date of the judgment, to be credited on the judgment. This judgment bore interest, as appears by the complainants' bill. The time of allowing damages was July 1819, as appears by the bill, and the agreed facts. So that interest was compounded at the date of the judgment, which was erroneous. It should merely have been simple interest on the $1000 to the date of the decree. This latter mode of entering the decree would exceed $2000 at the date of the decree; and the amount is increased by the compounding mode adopted by the court.

For the *appellees*, it was stated, that the case is one over which this court has no jurisdiction, and that the appeal should, therefore, be dismissed. The only matter in contest between the parties is the *claim of the bank for ten per cent. damages on the amount of the protested bill. [*44
If the bank be not entitled to those damages, and it was correct in the circuit court to relieve the complainants against that amount; it was doubtless proper also to enjoin the bank from the collection of the interest which has accrued thereon. But that interest is incidental to, and forms no part of, the matter in contest; and ought not to be taken into computation, in estimating the value of the subject in dispute. The damages claimed are less than $2000.

But should this court entertain jurisdiction of the case, it is respectfully insisted, on the part of the complainants, that there is no error in the decree. In reviewing the decree, and deciding on the matters in contest, the court will doubtless be governed by the law of Kentucky, as judicially expounded by the supreme court of that state. Such is understood to be the acknowledged principle on which this court acts, in cases depending on the laws of a particular state. 5 Cranch 22, 32; 1 Wheat. 279; 10 Ibid. 119; 11 Ibid. 301. And as the bill was drawn, accepted and indorsed in Kentucky, by persons then residing and living in that state, their liability for damages, on the return of the bill, and the right of the bank to demand damages, must depend on the particular laws of Kentucky. Story's Conflict of Laws, 261–2.

Under the law of Kentucky, the complainants were not liable to damages. There was, at the time the bill was drawn and accepted, in force in Kentucky, a statute containing the following provisions: "If any person or persons shall draw or indorse any bill or bills of exchange, upon any person or persons, out of this state, on any other person or persons, within any other of the United States of North America, and the same being returned back unpaid, with legal protest, the drawer thereof, and all others concerned shall pay the contents of said bill, together with legal interest from the time said bill was protested, the charges of protest, and ten per centum advance for the damages thereof, and so proportionably for a greater or smaller sum." 1 Litt. Laws Ky. 178; and 2 Ibid. 103.

If not liable to damages under the statute, the complainants cannot be

liable by the law-merchant, independently of the statute. It was competent to the legislature of Kentucky to regulate the liability of parties to bills of exchange, drawn, accepted and indorsed within *the limits of the state. This was done by the acts referred to, passed in 1793 and 1798; and, consequently, no principle of the law-merchant, incompatible with the provisions of those laws, if any such there be, can prevail. These laws, when examined, will be found, by necessary implication, if not by express words, to exclude the law-merchant from any influence on questions as to damages on bills of exchange.

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But according to a law-merchant, the complainants were not liable to any damages on this bill. The law of re-exchange is understood to be applicable to foreign bills only, or to such as are drawn by a person residing in a foreign country, on some one in this country, or *vice versâ;* and not to bills drawn in the United States, upon any one in any other of the United States. The statute of Kentucky clearly discriminates between the two classes of bills, and recognises the former, and not the latter, as foreign bills; and in the case of *Crisson* v. *Williamson*, 1 A. K. Marsh. 454, it was held by the supreme court of Kentucky, that a bill drawn in Kentucky on merchants at Philadelphia, was not a foreign bill. The same principle was held by the supreme court of New York, in the case of *Miller* v. *Hackley*, Anth. N. P. 63. The character of the bill is not, however, conceived to be material in the present case; for it is evident, that, in liquidating the damages, the parties acted on the supposition that the bill was embraced by the act of 1798 of Kentucky; and the damages were included in the note, not on account of any supposed liability in the complainants for re-exchange, upon the general principles of the law-merchant; but under the mistaken belief that they were liable under the act, for ten per centum damages on the amount of the bill, If such was not the understanding and intention of the parties, it is strange, that they should have included in the note damages to the exact amount of ten per cent.; when it is not, and cannot be pretended, that the exchange between Kentucky and New Orleans was at the time anything like that amount.

If, then, the complainants were not liable to the ten per centum damages, on the return of the bill, have they imposed on themselves a liability from which they cannot be relieved by the after-execution of the note to the bank? If, instead of including in the note the balance which remained unpaid of the bill, as well as the damages, the damages only had been included; there could, it is conceived, be no serious doubt on the subject. The note would then have been founded on no sufficient consideration; and under the laws *of Kentucky, authorizing defendants, by special plea, to go into and impeach the consideration, the complainants might have defeated a recovery at law. The case of *Ralston* v. *Bullits*, 3 Bibb 262, decided by the supreme court of Kentuck, would be decisive in such a case. In that case, it was decided, that a bond given by an indorser of a bill for the amount, after he was discharged of his liability, by the neglect of the holder to give notice, might be avoided by plea, impeaching the consideration. In the opinion delivered in that case, the court, after showing that the maker of the note was, at the term it was executed, discharged from liability to pay the bill for which the note was given, make use of the following remarks, viz: "If, therefore, the defendants were

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wholly discharged from any responsibility, for want of due notice of the non-acceptance of the bill, the bond given for the payment of the amount of the bill was without consideration. A promise to pay in such a case, is held not to be binding. *Blesard* v. *Hirst*, 5 Burr. 2670; Kyd 119. Nor would the circumstance that the promise was reduced to writing, make any difference; for a written, no more than a verbal promise, is binding, if made without consideration; and the act of 1801 (2 Litt. Laws Ky. 442), having authorized the defendant, in an action upon a bond or other writing under seal, by special plea, to impeach or go into the consideration, in the same manner as if such writing had not been sealed, it evidently fellows, that the bond on which suit is brought, is, in this respect, placed upon the same footing as a verbal or written promise, and consequently, not binding on the defendant." Since that case was decided, many others of like character have been brought before the courts of Kentucky; and in no one instance, has the correctness of the principle on which it turned been doubted, or its authority departed from. It has now become the settled and inflexible rule by which like cases are decided in that state, and should be sanctioned by this court; so far, at least, as respects cases depending on the laws of Kentucky.

But the note is not for the damages only; it includes the amount unpaid of the bill, as well as the ten per centum damages. The note cannot, therefore, with propriety, be said to be without consideration. The liability which the complainants were under, to pay the sum remaining unpaid on the bill, was a sufficient consideration for any promise or note which they might make for that amount. As to that amount, therefore, there was an adequate consideration for the note executed by the complainants. But their liability in that *respect formed no sufficient consideration for any note or promise which they might make for the ten per centum damages on the amount of the bill; and as to that amount contained in the note, it was as clearly voluntary and without consideration, as if contained in a separate note. It was not, however, competent for the complainants, by plea at law, to draw in question the right of the bank to the damages; as they might have done, if nothing but the damages had been contained in the note. Such a defence would have gone to part of the consideration of the note, only; and is clearly inadmissible, under the act of 1801, of Kentucky, as judicially expounded and settled by many cases in the supreme court of that state. 1 Bibb 500; 4 Ibid. 277; 1 A. K. Marsh. 168; 5 T. B. Monr. 274; 1 J. J. Marsh. 489. It does not, however, follow, that, because they could not defend at law, the complainants are without redress. Their case is one proper for the aid of a court of equity, to which they have applied for relief. [*47

The appellants contend, that the claim of appellees to relief was barred by the lapse of time, and the statute of limitations. On the contrary, we suppose, that neither lapse of time nor the statute of limitations apply to the case, or bar the right to relief. In the first place, to make out their case, the appellants assume the fact, that the payment made in 1819 on the bill of exchange, was first applied to the discharge of the damages claimed by the bank, and the remainder to the bill, and the new note given for the residue of the bill; whereas, there is neither allegation nor proof that this was the case. The same remark applies to the assumption, that the mistake of want

of liability for the damages was discovered more than five years before this suit was instituted.

But suppose, that in each particular, the facts of the case bore out the counsel of the bank in their assumption, still, lapse of time nor the statute of limitations does not cut off the right to relief. That right in equity attached to the new note when given, and has followed the debt ever since, as a living equity, against enforcing its collection to the extent of a mistake. To that extent, there was no consideration for the note. Suppose, a note is given without any consideration at all, is the party who gives it bound to file his bill, in five years after its date, and pray that it may be cancelled; or may he wait until there is an attempt to enforce it, and then assert his
*48] equity? Does not the *equity against the obligation subsist as long as the legal right to enforce it? If it does, when it applies to the whole demand, does it not, when it applies to a part?

If a partial payment had been made, eighteen years, on an obligation, and not credited, can it be contended, that because the obligee has waited that long, and now sues, that the obligor is barred from setting up the payment? The same may be asked, if the whole debt had been paid? Now, in equity, that which was paid in 1819, was a credit on the whole debt; and if it were not all applied, a court of equity will treat the subject-matter as if it had been applied, and will restrain the obligee from collecting the part paid and not credited. If, in 1819, Daniel and others had paid the bank $1000, in extra or usurious interest on the debt in controversy, and a new note had then been given for the residue of the debt, which the bank was now attempting to coerce; would not a court of equity apply the $1000 as a credit to the debt and legal interest due in 1819, and treat it as a payment made on the same at that time? This is a familiar instance of the application of the principle contended for. Equity disregards forms, and marches directly forward to the justice of the case; it considers that as actually done which in good conscience should have been done: it does not apply the credit now, but considers it as applied in 1819. Hence, neither lapse of ime nor the statute of limitations apply to the case.

Catron, Justice, delivered the opinion of the court.—To a just comprehension of the legal questions arising in this cause, it becomes necessary that the facts be stated, in the form and sense they present themselves to the court. The first transaction giving rise to the controversy, was a bill of exchange, in the following words:

"Exchange for 10,000 dollars.

"Lexington, October 12th, 1818.

"One hundred and twenty days after date, of this my first of exchange (second and third of same tenor and date unpaid), pay Henry Daniel, or order, ten thousand dollars, at the office of discount and deposite of the Bank of the United States, in New Orleans, for value received of him; which charge to the account of yours, &c.

"To Mr. James Daniel. Robt. Griffing."

*49] *James Daniel duly accepted the bill; and it was indorsed by Henry Daniel, Isaac Cunningham and Samuel Hanson, to the president, directors and company of the Bank of the United States. When it was

made and accepted, the drawer, Griffing, and James Daniel, the acceptor, resided and were in Kentucky, where the transaction took place. The indorsers, Henry Daniel, Cunningham and Hanson, also resided there. The bill was transmitted to New Orleans for payment; but not being paid, it was regularly protested and returned; and the bank looked to the drawer, acceptor and indorsers for the payment of principal and interest thereon, from the 9th February 1819, the time it fell due, together with charges of protest, and ten per centum damages on the principal. Griffiing, the drawer, and James Daniel, the acceptor, believing the claim for damages to be legal, paid the bank, July 1819, the sum of $3330.67, on account of the aggregate amount due and supposed to be due; and for the balance, Griffing and James Daniel executed their negotiable note for $8000, payable sixty days after date, to William Armstrong; to which Cunningham, Hanson and Henry Daniel were parties, either as co-makers or indorsers; and which was discounted by the office of discount of the Bank of the United States, at Lexington, for the benefit of Griffing and James Daniel, upon the express agreement between the parties making and indorsing the note, with the bank, that the proceeds should be applied to the *payment* of the balance due on the bill. Griffing and James Daniel were the principal debtors, and Cunningham, Hanson and Henry Daniel, sureties. The principals paid $500, in part discharge of the note; and in August 1826, Griffing, James Daniel, Henry Daniel, Cunningham and Hanson executed their joint note to the bank, for $7500, payable sixty days after date, for the balance. Griffing having died, and the note for $7500 not having been discharged, when due, the bank sued James Daniel, Cunningham, Henry Daniel and Hanson, in the circuit court of the United States for the district of Kentucky, and recovered a judgment at law, for the principal and interest; at what time, does not precisely appear.

In 1827, the defendants to the judgment at law, filed their bill in equity, in the same court; and after setting out the facts substantially as above, further alleged—"they were advised the bank was *not entitled to ten per centum damages, on said protested bill of exchange, inasmuch as [*50 the drawer and acceptor thereof both lived in Kentucky, at the date and maturity of said bill; and that, therefore, so much of said $8000 note, as exceeds the balance due on said bill, for principal, interest and damages (after deducting said payment of $3330.67) was included in said note *by mistake* as to the legal liability of said Griffing and James Daniel, for said ten per cent. damages, and as to said excess, said note was executed without any consideration whatever." The complainants also alleged, that the failure of consideration, on which the note for $7500 was grounded, being partial, relief against the excess, in the note and judgment, could only be had in a court of equity; and prayed the bank might be restrained, by injunction, from the collection of $1515, the excess that entered into the judgment, because of the mistake.

At the November term, 1827, an injunction was ordered by the court, restraining the bank from proceeding to collect $1515, part of the judgment, until the hearing.

The bank answered, admitting the statements of the complainants in reference to the liquidation of the bill of exchange, and the part payment and renewal of the $8000 note; and further averred, that, on the return of

the protested bill, the sum of $1000, being ten per cent. on the amount thereof, was claimed by the respondents as their damages; and the claim was assented to by the complainants, with a full knowledge of the facts upon which it was founded, and all the principles of law upon which it was asserted; and in pursuance of such assent, the amount of said bill, with interest, and the $1000 damages, was liquidated and discharged by complainants, in manner alleged; but aver, respondents cannot admit, "this was done under any mistake, either as to fact or law; indeed, two of complainants were lawyers of celebrity, and of deservedly high rank; and respondents cannot impute to them ignorance of the law; and ignorance of the facts is not pretended." The respondents further alleged, that, by a statute of Kentucky, bills of exchange drawn by a person in that state, on another out of the state, when returned protested, bore ten per cent. damages, besides interest; and independently of the statute, the bill for
*51] *$10,000 was subject to damages for re-exchange and expenses; that the effect of the statute was to reduce to uniformity and certainty, the amount to which the holders were entitled, in consequenee of the money not being paid at the place agreed upon, and the loss arising from difference of exchange and expenses. It is insisted, the claim for damages comes within the statute; yet, if not within it, that respondents are entitled to equal damages with those given by the statute, their risk and loss being the same. In bar of the claim, the respondents say, that all the grounds of equity alleged in the bill, accrued to complainants more than five years next before the commencement of the suit, and are barred by the lapse of time; they further alleged, that the damages were liquidated, assented to and discharged, more than five years next before the commencement of the suit; and all claim to relief is barred by the statute of limitations.

The allegations in the complainants' bill, not responded to, are admitted. To which answer, a general replication was filed. The only evidence in the cause was, an agreement of facts entered into by the parties, to wit: "It is agreed, that the statements contained in said bill, as to liquidation of the bill of exchange of $10,000, are true. It is also agreed, that this liquidation was on the 8th day of July 1819, and that no interest was charged up to that time, except upon $10,000. It is also admitted, that such renewals of the $8000 note were made, as are stated in said bill; and that the judgment at law was on one of the notes given in renewal." Upon the pleadings and admissions, the court proceeded to a hearing of the cause at the November term 1836, and decreed: "That a credit be entered on the judgment at law, obtained by the defendants against the plaintiffs, as set forth in the bill, for $1000, the amount of damages charged on the protested bill, with all interest charged on said sum up to the time of judgment; and that the defendants be perpetually enjoined from taking out execution on said judgment, for the sum thus decreed to be credited; but the decree not to affect the balance of the judgment. From which decree, the president, directors and company of the Bank of the United States, appealed to this court.

The first question raised on the facts, and in advance of the merits, is, whether the matter is controversy in the circuit court, was of sufficient
*52] dignity to give this court jurisdiction by appeal. *The act of congress provides, that appeals shall be allowed to the supreme court, from final decrees rendered in the circuit courts, in cases of equity jurisdiction,

where the matter in dispute, exclusive of costs, shall exceed the sum or value of $2000. The expression, sum or value of the matter in dispute, has reference to the date of the decree below, alike in cases of appeals in equity, and writs of error at law; they are each grounded on the original process of this court, operating on the final decree or judgment, and are limited to the sum or value then in controversy, and of which the decree or judgment furnishes the better evidence, should it furnish any. The matter in dispute below, was a claim to have deducted from the judgment at law, $1000, with interest thereon, after the rate of six per centum, from the 8th day of July 1819, up to the date of the decree, in November 1836; being upwards of seventeen years: and the circuit court decreed the reformation to be made of the judgment at law, by expunging therefrom, and as of its date, the $1000, with the interest. The effect was, to cut off the interest that had accrued on the $1000, from the date of the judgment, in 1827, to that of the decree, in 1836; interest on the principal sum recovered, being an incident of the contract, by the laws of Kentucky, as well after judgment as before. The practical consequence of the decree will immediately be manifest, when the bill is dismissed by the order of this court; the appellants will then issue their execution at law, and enforce the $1000, with the accruing interest, from the 8th of July 1819, until payment is made: it follows, that upon the most favorable basis of calculation, and disregarding the statute of Kentucky of 1789, giving ten per cent. damages in addition to legal interest on sums enjoined, the amount to which the decree below relieved the appellees, and deprived the bank of the right of recovery, was $2040; that is, $1000 principal, with seventeen years and four months of interest; this being the aggregate amount in dispute, and enjoined by the decree, of course, the supreme court has jurisdiction.

The second question raised by the record, rests mainly on the pleadings in the cause. It is alleged, the bank was not entitled to ten per cent. damages on the protested bill, inasmuch as the drawer and acceptor both resided in Kentucky; that the $8000 note included the damages of $1000 through mistake; and so far, it wanted consideration. *The defendants deny this was done through either mistake of the fact or law; insist they [*53 were entitled to ten per cent. damages by the statute of Kentucky; but if the statute did not apply, they were entitled to damages, for re-exchange and charges; and that the statute was justly referred to for the rule settling the measure of compensation.

As no mistake of the facts is positively alleged, and if impliedly stated, is directly and positively denied, we must take it, no such mistake existed; and such is manifestly the truth. In regard to the mistake of law, however, the pleadings can settle nothing; they make an issue, and refer it to the court for decision, on the local and general laws governing damages on bills of exchange of the character of the one set ferth.

The statute, by force of which the bank claimed damages, declares: "If any person or persons, shall draw or indorse any bill or bills of exchange upon any person or persons, out of this state, on any person or persons, within any other of the United States of North America, and the same being returned back unpaid, with legal protest, the drawer thereof, and all others concerned, shall pay the contents of said bill, together with legal interest from the time said bill was protested, the charges of protest, and

ten pounds per cent. advance for the damages thereof; and so proportionably for greater or smaller sums."

In 1821, the court of appeals of Kentucky, gave a construction to their statute, in the case of *Clay* v. *Hopkins*, 3 A. K. Marsh. 488, where it was holden, that where the drawer and acceptor were both of Kentucky, and the transaction took place there, the statute did not apply, although the bill was made payable in Baltimore. That and this case are alike in all their features. In a subsequent cause of *Wood* v. *Farmers' and Merchanics' Bank of Lexington*, 7 T. B. Monr. 284, the same court held, that a bill addressed to "Mr. J. J. Wood, New Orleans," was within the statute, and drew after it ten per cent. damages on protest; distinguishing *Wood's Case* from that of *Clay* v. *Hopkins*, because the acceptor was addressed, at the foot of the bill, as of New Orleans, although in fact he was of Kentucky.

This court, in accordance to a steady course of decision for many years, feels it to be an incumbent duty carefully to examine and ascertain if there be a settled construction by the state courts of the statutes of the respective states, where they are exclusively in force; *and to abide by, and follow such construction, when found to be settled. Looking to the two adjudications in Kentucky, on the construction of the statute of 1798, in the spirit of the rule we have laid down for our government; and without any reference to the misgivings we may entertain of the correctness of the construction, declared to be the true one in *Clay* v. *Hopkins*, we have come to the conclusion, that *Wood's Case* did not overrule the former. It is, therefore, declared by this court, that the bill of exchange, for $10,000, drawn by Robert Griffing, although payable at a bank in New Orleans, did not, by force of the statute of Kentucky, subject the drawer or others bound to take it up, to the payment of ten per cent. damages.

*54]

Not having been entitled by the statute, the appellants insist, they were authorized to charge damages by commercial usage, and that the statute prescribed a fair measure. The assumption, that the holder could lawfully demand damages, depends on the fact, whether the bill was foreign or inland; if foreign, then the bank had the right to redraw from New Orleans to Lexington, for such amount as would make good the face of the bill, including principal, re-exchange and charges, with legal interest; the law does not insist upon actual redrawing; but the holder may recover the price of a new bill at the place of protest. Had a jury been called on to assess the amount due, proof of the exchange against Lexington would have been necessary to the recovery of damages, on the ground of re-exchange; but the parties themselves having liquidated them, at the rate the statute of Kentucky allowed in cases very similar, we must presume, at this distant day, aside from any proof to the contrary, that ten per cent. was fair compensation: it may have been less; of this, however, the parties were the proper judges. Kent's Com., Lect. 44.

Whether a bill of exchange, drawn in one state of this Union, payable in another, is a foreign bill, involves political considerations of some delicacy, although, we apprehend, of no intrinsic difficulty at this day. The respective states are sovereign, within their own limits, and foreign to each other, regarding them as local governments. 2 Pet. 586. Kentucky and Louisiana, as political communities, being distinct and sovereign, and con-

sequently, foreign to each other in regard to the regulation of contracts; it follows, a bill drawn in one, payable in the other, is a foreign bill; and so this court adjudged in the cause of *Buckner* v. *Finley*, *2 Pet. 586. The bill, in that case, was drawn at Baltimore, by citizens of Maryland, on Stephen Dever, at New Orleans; whereas, the one in this case was drawn and accepted in Kentucky, but payable at a bank in New Orleans. Yet, we think, the place of payment being within a jurisdiction foreign to Kentucky, subjected the acceptor, James Daniel, to the performance of the contract, according to the laws of Louisiana, to every extent he would have been, had he became a party to the bill at New Orleans; and that the effect of the contract, on all the parties to it, does not vary from the one sued on in *Buckner* v. *Finley*, 2 Pet. 586; Story's Conflict of Laws, § 281–6. Being a foreign bill, and not having been affected by the statute of Kentucky, of course, the holders, by commercial usage, were entitled to re-exchange, when the protest for non-payment was made; and those bound to take it up, having paid, or agreed to pay, the damages, with a full knowledge of the facts, and a presumed knowledge of the law, voluntarily giving the bank a legal advantage, it would be going far for a court of chancery to take it away; the equities of the parties being equal, to say the least, it cannot be against conscience for the appellants to retain their judgment. [*55

The main question on which relief was sought by the bill—that on which the decree below proceeded, and on which the appellees rely in this court for its affirmance—is, can a court of chancery relieve against a mistake of law? In its examination, we will take it for granted, the parties who took up the bill for $10,000, included the damages of $1000 in the $8000 note; and did so, believing the statute of Kentucky secured the penalty to the bank; and that, in the construction of the statute, the appellees were mistaken. Vexed as the question formerly was, and delicate as it now is, from the confusion in which numerous and conflicting decisions have involved it; no discussion of cases can be gone into, without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply: indeed, the remedial power claimed by courts of chancery to relieve against mistakes of law, is a doctrine rather grounded upon exceptions, than upon established rules. To this course of adjudication, we are unwilling to yield. That mere mistakes of law are not remediable, is well established, as was declared by this court in *Hunt* v. *Rousmaniere*, 1 Pet. 15; and we can only repeat what was there said, "that whatever exceptions there may be to the rule, they will be found few in *number, and to have something peculiar in their character," "and to involve other elements of decision." 1 Story's Eq. § 129. [*56

What is this case? and does it turn upon any peculiarity? Griffing sold a bill to the United States Bank, at Lexington for $10,000, indorsed by three of the complainants, and accepted by the other, payable at New Orleans; the acceptor, J. D., was present in Kentucky, when the bill was made, and there accepted it; at maturity, it was protested for non-payment, and returned. The debtors applied to take it up; when the creditors claimed ten per cent. damages, by force of the statute of Kentucky. All the parties bound to pay the bill were perfectly aware of the facts; at least, the principals, who transacted the business, had the statute before them, or were familiar with it, as we must presume; they and the bank earnestly believing (as ir

all probability most others believed at the time), that the ten per cent. damages were due by force of the statute, and influenced by this opinion of the law, the $8000 note was executed, including the $1000 claimed for damages. Such is the case stated and supposed to exist by the complainants, stripped of all other considerations standing in the way of relief.

Testing the case by the principle, "that a mistake or ignorance of the law, forms no ground or relief from contracts fairly entered into, with a full knowledge of the facts;" and under circumstances repelling all presumptions of fraud, imposition or undue advantage having been taken of the party (none of which are chargeable upon the appellants in this case), and the question then is, were the complainants entitled to relief? To which we respond decidedly in the negative.

Lastly, the appellants rest their defence on the statute of limitations. If the $1000 claimed as damages were paid to the bank, at the time the bill of exchange was taken up, then the cause of action to recover the money (had it been well founded) accrued at the time the mistaken payment was made, which could have been rectified in equity, or the money recovered back by a suit at law. The courts of law and equity having concurrent jurisdiction; and the complainants having elected to resort to equity (which they had the right to do), were as subject to be barred by the statute in the one court as in the other. In such cases, the courts of equity act in obedience to the statutes of limitation, from which they are no more exempt than courts of law.

*57] *This suit having been brought more than five years after the bill was taken up; to apply the bar, it becomes necessary to inquire whether the damages were then paid. The complainants allege, that they paid, in July 1819, $3330.67, on account of the whole amount due, consisting of principal, interest, charges and damages; and for the balance of the amount of the bill, Griffing and James Daniel executed their negotiable note for $8000, payable sixty days after date, to William Armstrong, to which Cunningham, Hanson and Henry Daniel were parties as indorsers or co-makers; which note was discounted by the bank, for the benefit of Griffing and James Daniel; and upon the express agreement between them and the bank, and the other parties to the note, that the proceeds of said $8000 note, should be applied to the payment of the balance due on the said bill of exchange. The parties to this suit agreed in writing, that the statement above set forth was true; and the bill was liquidated by the proceeds of the note, and the $3330.67.

If the pre-existing debt due the bank, and evidenced by the bill of exchange, was extinguished, when the bill was taken up; then the remedy of the bank was gone, and the right to recover the $1000 of excess arose. It is generally true, that giving a note for a pre-existing debt, does not discharge the original cause of action, unless it is agreed, that the note shall be taken in payment. 6 Cranch 264. In reference to this principle, it is insisted, for the appellees, that the $8000 note given to the bank, and the renewals of it afterwards, furnished mere evidence of the continuance of the original liability, from which they should be relieved; because the notes covered too much, by $1000, with interest; so the court below thought, and decreed the abatement.

This court thinks the facts do not involve the principle referred to. We are not told by the appellees, that the $8000 note was taken in payment of

the balance of the bill of exchange ; but that $3330.67 in cash was paid, and the note discounted, the money obtained upon it, and "by express agreement, applied to the payment of the balance due on said bill of exchange." The debtors raised the cash, and paid the bill ; nor did the $8000 note enter into the transaction, further than that the proceeds were applied to the *extinguishment of the pre-existing debt. Payment was, therefore, made on the 8th of July 1819 ; and the $1000 could have been sued for then, as well as in 1827, when the bill of injunction was filed. It follows, the act of limitation is a bar to the appellees, aside from any other grounds of defence. [*58

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel : On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to that court to discharge the injunction at law, and to dismiss the bill in this cause, at the cost of the complainants.

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*Martha Bradstreet, Plaintiff in error, *v.* Anson Thomas. [*59

Jurisdiction—Averment of citizenship.

The demandant, a subject of the king of Great Britain, instituted an action, by writ of right, in the district court for the northern district of New York, against the defendant, a citizen of New York ; in the declaration, there was no averment that the defendant was a citizen of New York. The defendant pleaded to the first count in the declaration, and demurred to the second and third counts ; the demandant joined in the demurrer, and averred that the defendant was a citizen of New York. In the subsequent proceedings in the case, in the district court, and afterwards in the supreme court, no exception was taken by the defendant, that there was no averment in the declaration, that the defendant was a citizen of the United States ; and not until the case came a second time before the supreme court, to which it was now brought by a writ of error, prosecuted by the demandant in the writ of right. The defendant moved to dismiss the writ of error, for the want of an averment of the citizenship of the defendant, in the declaration ; the court overruled the motion.

The district court was not bound to receive the averment of the citizenship of the defendant in the joinder in demurrer ; and clearly ought not to have received it, if it had been objected to by the tenant. But he has waived the objection, by failing to make it at an earlier stage of the cause ; and after the proceedings which have taken place in the district court, and in this court ; and when the cause has been so long continued, and allowed to proceed in the same condition of the pleadings and averments, it would be unjust to the demandant to dismiss it upon this mere technical informality. The pleadings, in fact, contain all the averments required by the decisions of this court, to give jurisdiction to the courts of the United States ; and as they appear to have been acquiesced to by the tenant, and regarded as sufficient in the district court, and were not objected to in this court, when the case was here on the application for a *mandamus ;* the informality cannot be relied on now to dismiss the suit.[1]

Error to the District Court of the Northern District of New York.

Beardsey, moved to dismiss the writ of error, it not being stated in the writ or declaration, that the defendant was a citizen of the state of New York. The plaintiff is an alien, and this is stated in due form ; but nothing is said of the citizenship of the defendant.

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* See Smith *v.* Clapp, 15 Pet. 128.

The constitution of the United States gives jurisdiction to the courts of the United States, when an alien is a party, who sues a defendant, a citizen of the state in which the suit may be brought; and it has been expressly decided, that both parties must be stated, descriptively, in the pleadings. And where, as in this case, jurisdiction depends on the character of the
*60] parties, the averment of character *is not matter of form, but of substance—it may be traversed; and in that event, must be proved like any other material fact. Cited, 5 Cranch 303; 4 Dall. 12; 3 Ibid. 382; and 1 Pet. Cond. 170, where all the cases are collected in a note.

There is no averment of the value of the property, in either count of the plaintiff's declaration; although it appears from the bill of exceptions, to have been of the value of $2000. There is, however, no doubt of the right of the party to prove the value of the property to be such as will give the right to a writ of error; this is not now taken as an objection to the proceeding to bring the case before this court. The objection, so far as respects the point of value, is that the court below had no jurisdiction; there being no averment that the property was worth more than $500. The defendant relies on the absence of the necessary averment of the citizenship of the defendant, as a sufficient ground to dismiss the writ of error, the district court of New York not having had jurisdiction to entertain the cause.

Meyer and *Jones*, for the defendant.—The motion to dismiss the writ of error, is founded on the allegation that there is no averment of the citizenship of the defendant; although, that the plaintiff is a subject of the king of Great Britain, is stated in the writ. It is too well established to permit it to be controverted, that an alien cannot sue in the courts of the United States, unless the fact of alienage is stated, and the defendant is stated to to be a citizen of the state in which the suit may be instituted. This is under the provision of the constitution of the United States, and under the judiciary act of 1789. It must appear in the proceedings in the case, that such is the relative position of the parties. In this case, there is an averment of the citizenship of the defendant, and this will be found in the plaintiff's joinder in demurrer; where it is distinctly and explicitly averred, that the defendant is a citizen of the state of New York, and a resident in the northern district of that state. The defendant had demurred, and the plaintiff joined in the demurrer; accompanying this with an averment of the defendant's citizenship and residence. The question before the court is, whether this is sufficient.

No objection to the insufficiency of the averment, or to its location, was
*61] made on the trial of the cause. The parties had been before this *court on a former occasion (7 Pet. 634), and after argument, a *mandamus* was issued to the judge of the district court, under which the case was restored to the docket; and after which the trial took place. In none of those proceedings was an objection made to the absence of the averment of the citizenship of the defendant, in the early part of the pleadings. It is not known why the averment of the citizenship may not be postponed, by the consent of the parties, to the latter part of the pleadings. The fact of the alienage of the plaintiff, and of the citizenship of the defendant, was well known, and therefore, the objection was not taken. Had it been taken in the early stage of the case, an amendment would have been moved, and

would have been admitted. There is no rigid rule which requires the averment of citizenship to have a particular locality. No rule which requires a party to exhibit his case in any particular part of the pleadings. A party may change his case by averments, if his opponent does not except to them. This shows that there is no judicial requirement as to where they shall appear, if no dissent is given by the opposite party. So too, defects in pleading may be cured by implications from the pleadings of the opposite party. 1 Chitty Plead. 710; Ibid. 467–8. These authorities show, that if in the course of the pleadings, facts appear, the court will consider them as facts, upon which they may judicially act. For the honor of the common law, it will not be said, that it does not aid the party in exhibiting his case. Why else are new averments allowed? There is no rule as to the locality of averments; and no rule which requires the matters to be stated in the early part of the pleadings, on which the court are permitted to proceed in the cause.

Many cases have been adjudged in the circuit, and in the supreme court, as to the jurisdiction of the courts of the United States, dependent on the character of the parties; but in no one of them is it settled, where the averments on the subject shall appear. In the case of *Montalet* v. *Murray*, 4 Cranch 46, while it is decided, that to give jurisdiction, the character of the parties to the suit must appear on the record; it is nowhere said, on what part of the record there shall be this description. If it appears on any part of the record, that the parties are such as to give the court jurisdiction, this is a full compliance with the requisitions of the *constitution, and the act of congress. All the exigencies of the law are complied with. [*62

After a trial and verdict, the party is not allowed to except to the jurisdiction of the court, even in a case in which the court had not jurisdiction; it is too late. 4 W. C. C. 483. A case may be submitted to the court, on a statement of facts, and have all the substance of a case presented on formal special pleadings; the only object of the pleadings, is to exhibit the case. This shows the court does not look at forms, if the substance is preserved. In this case, the court cannot but see that the parties are within their jurisdiction. How is it, as to the tenant, in the case before the court? and what will be his situation, if strict rules are applied to him? As a general principle, a plea to the jurisdiction should be put in, before a plea to the merits; and the question of jurisdiction is supposed to be waived by a neglect to plead it. 4 Mason 434; 3 Johns. 105; 1 Paine 594. Cited also, 11 Pet. 85, as to the mode and time of pleading to jurisdiction.

This court has always reluctantly exercised its power to dismiss a case for want of jurisdiction; the cases are numerous to show this. In every such case which has been dismissed, there has been a want of an averment, and no proof of the citizenship of the party. But in this case, there is an averment, and the defendant does not deny its truth. He holds back, after the suit is brought; he subjects the plaintiff to all the expenses of prosecuting his action; he submits to have the cause brought up to this court, and to the action of this court on the case, by a *mandamus* to the district judge; to a trial; to a bill of exceptions and verdict; to a writ of error to this court; and now, without a denial of the fact averred, that he is a citizen and resident of the northern district of New York, he asks that the case shall be dismissed. Cases cited in the argument: 8 Wheat. 421; 1 Mason 360; 1 Paine 410; 6 Cranch 267.

TANEY, Ch. J., delivered the opinion of the court.—A motion has been made by the defendant in error, to dismiss this case, upon the ground, that the averments necessary to give jurisdiction to the courts of the United States do not appear in the record. The decisions which have heretofore been made on this subject, render it proper that the circumstances under which this motion comes before the court should be stated.

*63] *A writ of right was brought in the district court for the northern district of New York, to recover certain lands situated in the state of New York. The demandant, in her declaration, avers that she is an alien, and a subject of the king of the United Kingdom of Great Britain and Ireland; but does not aver that the tenant is a citizen of the state of New York, or of any other state of the United States. The suit was brought to January term 1825, at which term, the tenant appeared, and prayed leave to imparl, until the next term "saving all objections as well to the jurisdiction of the court as to the writ and count." The case was continued from term to term, until August term 1826, when the tenant put in the usual plea to the first count, and demurred to the second and third, setting down special causes of demurrer. The demandant joined in the *mise* on the plea and joined in the demurrer; and in her joinder in demurrer, she averred that the defendant was a citizen of the state of New York. The want of this averment of citizenship in the counts was not one of the causes of demurrer assigned by the tenant. The demurrers were decided against the demandant, at August term 1827, and further proceedings were had which it is unnecessary to state here, and the case continued until August term 1831, when the defendant moved the court to dismiss the suit for want of jurisdiction; assigning as the foundation of this motion, the want of an averment of the pecuniary value of the lands demanded in the counts filed by the demandant. The court sustained the motion, and dismissed the suit. But at that time no objection to the jurisdiction was made on account of the omission to aver the citizenship of the tenant. In 1843, this dismissal of the suit was brought before the supreme court, and a rule laid on the district court, to show cause why the case should not be reinstated in that court; and at January term 1833, a peremptory *mandamus* was issued by this court, commanding the district court to reinstate the suit, and "to proceed to try and adjudge, according to the law and right of the case, the said writ of right and the *mise* therein joined." The *mandamus* was obeyed and the cause reinstated, and the *mise* tried and found against the demandant; and judgment entered against her, at November 1837. The case is now before us upon a writ of error on this judgment; and a motion is made to dismiss the case, upon the ground, that neither the district court nor this

*64] court could have jurisdiction of the *suit; because the demandant is an alien, and there is no averment that the tenant was a citizen of New York.

The above statement of the proceedings makes it evident, that the dismissal of the suit, upon this ground, at this time, would be a surprise upon the demandant, who has been prosecuting the suit for many years; most probably, under the impression that the averment of citizenship contained in her joinder in demurrer, was considered by this court and by the district court, to be sufficient compliance with the rules of pleading established by the decisions of this court. For the averment in question was received in

the district court without objection; and, indeed, would seem to have been regarded as sufficient by that court; because, when the suit was dismissed there, upon the ground that the counts did not contain proper averments to give jurisdiction, no notice was taken of the want of this averment in the counts, nor any objection to the place where it had been inserted in the pleadings; and when the case was brought before this court, on the application for the *mandamus*, the fault in the pleadings now charged, was not noticed by the court in the opinion delivered, and does not appear to have been brought to their attention by the counsel for the tenant. 7 Pet. 634. The demandant might, therefore, reasonably have supposed, that the court deemed the averment sufficient; because, certainly, the *mandamus* would not have been issued, commanding the district court to reinstate the case, and proceed to try it, unless this court had been of opinion, that a sufficient cause was presented by the pleadings, to give jurisdiction to the district court.

The principle on which this averment has been required is purely technical. But the rule has been established by the decisions of this court, and we do not mean to disturb it; and the proper place for the averment is undoubtedly in the declaration of the plaintiff in the cause. The district court was not bound to receive it in the joinder in demurrer; and clearly, ought not to have received it, if it had been objected to by the tenant. But he has waived the objection, by failing to make it in an earlier stage of the cause; and after the proceedings which have taken place in the district court, and in this court; and when the cause has been so long continued, and allowed to proceed in the same condition of the pleadings and averments, it would be unjust to the demandant, to dismiss it upon this mere technical *informality. The pleadings, in fact, contain all the averments required by the decisions of this court to give jurisdiction to [*65
the courts of the United States; and as they appear to have been acquiesced in by the tenant, and regarded as sufficient in the district court, and were not objected to in this court, when the case was here on the application for a *mandamus;* we do not think, the informality can be relied on now, to dismiss the suit. The motion is, therefore, overruled.

Baldwin, Justice, dissented.

Motion denied.[1]

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[1] For further decisions in this cause, see *post*, p. 174, and 16 Pet. 318.

JOHN MCKINNEY, WILLIAM MCCONNELL and KAY MOSS, Plaintiffs in error, *v.* JOHN CARROLL.

Error to state court—Practice.

To give the supreme court of the United States jurisdiction, under the 25th section of the judiciary act, in a case brought from the highest court of a state, it must be apparent in the record, that the state court did decide in favor of the validity of a statute of the state, the constitutionality of which is brought into question on the writ of error. Two things must be apparent in the record; first, that some one of the questions stated in the 25th section, did arise in the state court; and secondly, that a decision was actually made thereon by the same court, in the manner required by the section.

Where one of three parties, plaintiffs in a writ of error, dies, after the writ of error is issued, it is not necessary to make the heirs and representatives of the deceased, parties to the writ of error; as the cause of action survives to the two other plaintiffs in error.[1]

ERROR to the Court of Appeals of the state of Kentucky.

This case was argued by *Jones*, for the plaintiffs in error, and by *Woodward*, for the defendant. The argument was upon points upon which the court expressed no opinion; as on consideration of the case, it was found not to be within the jurisdiction of the supreme court, to which it had been removed by a writ of error to the court of appeals of Kentucky. The arguments of the counsel are not, therefore, inserted in the report.

MCKINLEY, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the court of appeals of Kentucky, affirming a judgment of the Jessamine circuit court.(*a*) The heirs of John Moss recovered a judgment in ejectment, against the defendant in error, in the circuit court, at the October term 1815, for a tract of land in Jessamine county; and at the same term, commissioners were appointed, in conformity with the act of the 31st of January 1812, concerning occupying claimants of lands, to value *the land in controversy, the improvements thereon, &c. At a subsequent term of the court, the commissioners made their report; and among other things, reported the improvements on the land to be of the value of $1698. At the October term 1819, of the said circuit court, on the motion of the defendant, judgment was rendered in his favor, against the plaintiffs in ejectment, for said sum of $1698. And on the 25th day of October 1819, the plaintiffs in error, as sureties of the plaintiffs in ejectment, executed a bond to the defendant, with condition to pay said sum of $1698, in two equal annual instalments, with interest, as authorized by said act; which bond had, by law, the force of a judgment; and execution was authorized to be issued thereon, as in case of replevin bonds.

*67]

On the 7th day of December 1821, an execution issued on the bond, against the plaintiffs in error; who, availing themselves of the benefit of a

(*a*) At the last term of this court, the death of John McKinney, one of the plaintiffs, was suggested, and the cause continued for revivor, under the mistaken opinion that he was the only plaintiff. On inspection of the record, it appeared, that there are two other plaintiffs; and as the cause of action survived to them, the revivor was unnecessary.

[1] A writ of error abates, at common law, by the death of one of the plaintiffs in error, before errors assigned. Boas *v.* Heister, 3 S. & R. 271. Otherwise, under the Pennsylvania statutes. Ulshafer *v.* Stewart, 71 Penn. St. 170. See Clarke *v.* Rippon, 1 B. & Ald. 586

statute, then in force, replevied the debt for two years more. When execution issued against them, on the replevin bond, they applied to the judge of said circuit court, for a writ of error *coram vobis;* and in their petition, assigned, in substance, these errors: first, the act of the 31st of January 1812, concerning occupying claimants of lands, is a violation of the compact between Virginia and Kentucky, and a violation of the constitution of the United States, and therefore, the bond and other proceedings under it, are void; second, but one bond was given for both instalments, when there should have been a bond given for each instalment; third, but one execution issued for both instalments, when there should have been an execution issued for each instalment; fourth, the law under which the replevin bond was given, is a violation of the constitution of Kentucky, and a violation of the constitution of the United States, and therefore, the bond is void; fifth, the whole proceedings are erroneous, wanting form and substance.

The judge of the circuit court awarded the writ of error *coram vobis*, on the 15th day of March 1824, returnable to the next term of said circuit court. At which term, on the 28th day of April 1824, by judgment of the court the writ of error *coram vobis* was dismissed. From this judgment, the plaintiffs in error appealed to the court of appeals; and assigned there the following errors: first, the court erred in giving judgment upon the several matters and errors alleged in the petition for the writ of error *coram vobis* and the assignment *of errors therein contained; second, the court ought to have quashed the said execution, bond, &c., as [*68 prayed for in the petition and writ of error *coram vobis*. Upon the hearing of the cause, the court of appeals affirmed the judgment of the circuit court.

The jurisdiction of this court over this cause was not questioned at the bar; but the question appears necessarily to arise on the record, and must, therefore, be decided by the court. The 25th section of the judiciary act of 1789 confers appellate jurisdiction on this court, from final judgments and decrees, in any suit in the highest court of law or equity of a state, in which a decision of the suit could be had; where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption set up or claimed by either party.

In this case, two statutes of Kentucky have been drawn in question, on the ground of their repugnance to the constitution of the United States. But whether the court of appeals decided in favor of their validity, will depend, first, upon whether the questions arising under those statutes were not, or might have been, decided upon the authority of the state laws, without involving their validity under the constitution of the United States; and secondly, whether the record of this case shows that the court did decide in favor of their validity.

A question arose at the bar, whether the judgment of the circuit court,

in favor of the defendant, and against the plaintiffs in ejectment, was before the court of appeals, on the trial there. The counsel for the plaintiffs in error insisted that it was; and therefore, a proper subject of examination in this court. The plaintiffs in error were not parties to the judgment of the circuit court; they became parties in the record, by being the sureties of the plaintiffs in ejectment, in the improvement bond; which was subsequent to, and in fact, the fruit of, that judgment. The appeal which they took, was from the judgment of the circuit court, upon the writ of error *coram vobis;* and the errors which they assigned in the court of appeals, limited the *inquiry before that court, to the correctness of that judgment. *69]
But independently of these grounds, the statutes of Kentucky, regulating the writ of error *coram vobis*, limit its operation, expressly, to errors arising subsequent to the judgment of the inferior court. Morehead & Brown's Digest, 1554–5.

The first error assigned in the petition for the writ of error *coram vobis*, draws in question the validity of the act of the 31st of January 1812, concerning occupying claimants of lands; on the ground, that it is in derogation of the compact between Virginia and Kentucky, and repugnant to the constitution of the United States. Neither the plaintiffs in ejectment, nor the defendant, appear to have raised this question in any part of the proceedings between them. The plaintiffs in ejectment did not sign the improvement bond, and were not, therefore, parties to the suit in the court of appeals; and consequently, are not parties here. They, and they alone, had a right to object to the judgment of the circuit court against them, and in favor of the defendant, and the proceedings under it, on the ground, that the act of the 31st of January 1812, was unconstitutional. By that act, they were deprived of the rents and profits of their land, while in the occupation of the defendant; and compelled to pay him for all improvements which he had made thereon. And this is the ground of the decision of this court, in the case of *Green* v. *Biddle*, 8 Wheat. 1; which was relied on by the counsel for the plaintiffs in error. The plaintiffs in error were the mere sureties of the plaintiffs in ejectment, for the money adjudged to the defendant, for his improvements. The bond which they signed, was a voluntary act and a part of the means provided by the said law, to enable the defendant to obtain satisfaction of his judgment. The validity of the proceedings, so far as they were concerned, did not depend upon the constitutionality of the act concerning occupying claimants of land; and therefore, they had no right to complain of it.

The fourth error in the petition draws in question the validity of the statute of Kentucky, authorizing defendants to give replevin bonds, payable in two years, upon the plaintiff's failing to cause to be indorsed on his execution, that he would take the notes of certain banks specified in the act, in discharge thereof. Had the plaintiffs in error paid the amount of the execution, which issued against them, on the improvement bond, in money, as they were bound to do, this question would never have arisen Having availed themselves of the benefit of the credit extended to them by that act, and delayed the *defendant in error, in the payment of the *70]
debt they had thus voluntarily again assumed upon themseives; is it proper, that at the end of the four years, they should be permitted to come into court, and set aside the whole proceedings against them, on the abstract

principle, that the statute under which they had taken place, violated the constitution of the United States? The court of appeals of Kentucky has decided, that a replevin bond cannot be set aside, at the instance of the debtor, of the ground that the law under which it was given was unconstitutional. Let it be conceded, says the court, that the constitution of the United States, or of this state, is violated by the law in question; whose rights are infringed by it? Certainly, not those of the debtor, for the law is passed and operates exclusively for his benefit. *Small* v. *Hogden*, 1 Litt. 16. And in a subsequent case, the purchaser of a tract of land, under an execution sale, on a credit of one year, attempted to set aside the bond which he had given for the purchase-money, on the ground, that the law, under which the sale had been made, and the bond had been executed, violated the constitution of the United States. On the authority of the above case, the court refused to set aside the bond and sale. *Rudd* v. *Schlatter*, 1 Litt. 19.

Upon this view of the case, it may be fairly presumed, that the court of appeals decided upon some, or all, of the grounds here stated; and that it did not decide in favor of the validity of the statutes referred to. But to give this court jurisdiction, it is not sufficient to show, that the court below might have decided in favor of the validity of these statutes, or either of them; it must be apparent, in the record, that the court did so decide. In the cases of *Crowell* v. *Randell*, and *Shoemaker* v. *Randell*, 10 Pet. 391, the court went into a review of all the cases which it had previously decided, under the authority of the 25th section of the judiciary act of 1789. In delivering the opinion of the court, Mr. Justice STORY says: "In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred, and be apparent in the record: first, that some one of the questions, stated in the section, did arise in the court below; and secondly, that a decision was actually made thereon by the same court, in the same mannner required by the section. If both of these do not appear in the record, the appellate jurisdiction fails. It is not sufficient to show, that such a question might have *occurred, or such a decision might have been made, in the court below. It must de demonstrable, that they did exist, and were made." [*71

As it nowhere appears in the record of the cause under consideration, that the court of appeals of Kentucky did decide in favor of the validity of either of the statutes drawn in question before it; but, on the contrary, it appearing to be reasonably certain, that its judgment was rendered on all the questions presented for its adjudication, on the authority of the state laws; this court has, therefore, no jurisdiction of this case. The writ of error must be dismissed.

ON consideration of the suggestion and motion made by Mr. *Jones*, of counsel for the plaintiffs in error, in this cause, on a prior day of the present term of this court, to wit, on Thursday, the 11th day of January, it is the opinion of this court, that it is unnecesary to make the heirs and representatives of John McKinney, whose death has been suggested on the record, parties to this writ of error; as the cause of action survives to the two other plaintiffs in error.

This cause came on to be heard, on the transcript of the record from the court of appeals for the state of Kentucky, and was argued by counsel: On consideration whereof, it is the opinion of this court, that this court has not jurisdiction in this cause; whereupon, it is now here ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed, for the want of jurisdiction. All of which is hereby ordered to be certified to the said court of appeals, under the seal of this court.

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*72] *UNITED STATES, Plaintiffs, *v.* LAWRENCE COOMBS.

Criminal jurisdiction—Construction of statutes—Regulation of commerce.

Indictment, in the circuit court of the United States for the southern district of New York, for feloniously stealing a quantity of merchandise belonging to the ship Bristol, the ship being in distress and cast away on a shoal of the sea, on the coast of the state of New York. The indictment was founded on the 9th section of the act, entitled "an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes, approved 3d March 1825." The goods were taken above high-water mark, upon the beach, in the county of Queens, in the state of New York: *Held*, that the offence committed was within the jurisdiction of the circuit court.

If a section of an act of congress admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of congress, it is the duty of the supreme court, to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any constitutional authority, unless that conclusion is forced on the court, by language altogether unambiguous.

In cases purely dependent upon the locality of the act done, the admiralty jurisdiction is limited to the sea, and to the tide-water, so far as the the tide flows. Mixed cases may arise, and often do arise, where the act and services done are of a mixed nature; as, where salvage services are performed partly on tide-waters and partly on shore, for the preservation of the property; in which the admiralty jurisdiction has been constantly exercised, to the extent of decreeing salvage.

Under the clause of the constitution giving the power to congress "to regulate commerce with foreign nations, and among the several states," it possesses the power to punish offences of the sort enumerated in the ninth section of the act of 1825. The power to regulate commerce, includes the power to regulate navigation, as connected with the commerce with foreign nations and among the states; it does not stop at the mere boundary line of a state; nor is it confined to acts done on the waters or in the necessary course of the navigation thereof; it extends to such acts done on land which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the states. Any offence which thus interferes with, obstructs or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers.[1]

Upon the general principles of interpreting statutes, where the words are general, the court are not at liberty to insert limitations, not called for by the sense, or the objects, or the mischief of the enactment.

CERTIFICATE of Division from the Circuit Court for the Southern District of New York. Lawrence Coombs was indicted under the 9th section of the
*73] act entitled, *"an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes, approved the 3d of March 1825," for having, on the 21st of November 1836, feloniously stolen, at Rockaway beach, in the southern district of New York,

[1] United States *v.* Pitman, 1 Sprague 196. And see Waring *v.* Clarke, 5 How. 441.

one trunk, of the value of five dollars, one package of yarn, of the value of five dollars, one package of silk, of the value of five dollars, one roll of ribbons, of the value of five dollars, one package of muslin, of the value of five dollars, and six pairs of hose, of the value of five dollars; which said goods, wares and merchandise belonged to the ship Bristol, the said ship then being in distress and cast away on a shoal of the sea, on the coast of the state of New York, within the southern district of New York. On this indictment, the prisoner was arraigned, and pleaded not guilty, and put himself upon his country for trial.

It was admitted, that the goods mentioned in the indictment, and which belonged to the said ship Bristol, were taken above high-water mark, upon the beach, in the county of Queens; whereupon, the question arose, whether the offence committed was within the jurisdiction of the court; and on this point, the judges were opposed in opinion. Which said point, upon which the disagreement happened, was stated, under the direction of the judges of the court, at the request of the counsel for the United States, and of Lawrence Coombs, parties in the cause; and ordered to be certified unto the supreme court at the next session, pursuant to the act in such case made and provided.

The case was argued by *Butler*, Attorney-General of the United States. No counsel appeared for the defendant.

Butler stated, that no jurisdiction could exist over the case, unless it was given by the acts of congress. The first crimes act of the United States, of 1790, and the act of 1825, showed the object of congress to have been to prevent the perpetration of such crimes as those charged against the defendant. The penalties imposed by the first act, were found to be too heavy; the act of 1825 was passed, and many offences were included in it which were in the first law. These offences were those which might be committed "on the high seas, and out of the jurisdiction of a particular state." But the 9th section omits the limitation of "the high seas," &c.

The ship must be cast away, or be in distress, or be wrecked in *the admiralty jurisdiction; and if any person steals goods belonging to her, the punishment attaches. In this case, it was admitted, that the ship was in the condition described in the act; but the goods were above high-water mark, when stolen. The rest of the section shows that the object of congress was to include cases above high-water mark. "Showing false lights" would, in most cases, be on the shore and in places above the tide. [*74

No serious doubt of the power of congress to punish such offences can exist. The power given by the constitution to regulate commerce, necessarily includes the power to protect the goods which are the subject of commerce; and it is of no consequence, whether the commerce is foreign or domestic. The view which congress entertained of this power, is shown by its legislation in the first crimes act; in which, aiding or advising in piracy, is made punishable; these are acts which, in many cases, would be done on shore. All that is necessary is, that the matter which is the subject of the prosecution, shall be connected with, or have grown out of, commerce.

Story, Justice, delivered the opinion of the court.—This is a case, certified upon a division of opinion of the judges of the circuit court for the

southern district of New York. The case, as stated in the record, is as follows :

Lawrence Coombs was indicted under the 9th section of the act, entitled " an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved the 3d of March 1825, for having, on the 21st of November 1836, feloniously stolen, at Rockaway beach, in the southern district of New York, one trunk, of the value of five dollars, one package of yarn, of the value of five dollars, one package of silk, of the value of five dollars, one roll of ribbons, of the value of five dollars, one package of muslin, of the value of five dollars, and six pairs of hose, of the value of five dollars ; which said goods, wares and merchandise belonged to the ship Bristol, the said ship then being in distress, and cast away on a shoal of the sea, on the coast of the state of New York, within the southern district of New York. On this indictment, the prisoner was arrigned, and pleaded not guilty ; and put himself upon his country for trial.

It was admitted, that the goods mentioned in the indictment, and which belonged to the said ship Bristol, were taken above high-water *mark, upon the beach, in the county of Queens ; whereupon, the question arose, whether the offence committed was within the jurisdiction of the court ; and on this point the judges were opposed in opinion. Which said point, upon which the disagreement has happened, is stated above, under the direction of the judges of said court, at the request of the counsel for the United States, and Lawrence Coombs, parties in the cause, and ordered to be certified unto the supreme court at the next session, pursuant to the act in such case made and provided.

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The ninth section of the act of 1825, ch. 276, on which the indictment in the present case is founded, is in the following words : " That if any person shall plunder, steal or destroy any money, goods, merchandise, or other effects from, or belonging to, any ship or vessel, or boat, or raft which shall be in distress, or which shall be wrecked, lost, stranded or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any place within the admiralty or maritime jurisdiction of the United States ; or if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life from such ship or vessel, boat or raft, or the wreck thereof ; or if any person shall hold out or show any false light or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger or distress or shipwreck, every person so offending, his or their counsellors, aiders or abettors, shall be deemed guilty of felony ; and shall, on conviction thereof, be punished by a fine, not exceeding five thousand dollars, and imprisonment and confinement at hard labor, not exceeding ten years, according to the aggravation of the offence." (4 U. S. Stat. 116.) The indictment, as has been already stated, charges the offence to have been committed on Rockaway beach, and, as is admitted, above high-water mark.

Before we proceed to the direct consideration of the true import and interpretation of this section, it seems highly important, if not indispensable, to say a few words as to the constitutional authority of congress to pass the same. For if, upon a just interpretation of the terms thereof, congress have exceeded their constitutional authority, it will become our duty to say so,

and to certify our opinion on the points submitted to us, in favor of the defendant. On the other hand, if the section admits of two interpretations, each of which is within the constitutional authority of congress, that ought to be adopted, *which best conforms to the terms and the objects manifested in the enactment, and the mischiefs which it was intended [*76 to remedy. And again, if the section admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any constitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous. And, accordingly, the point has been presented to us under this aspect, in the argument of the attorney-general, on behalf of the government.

There are two clauses of the constitution which may properly come under review, in examining the constitutional authority of congress over the subject-matter of the section. One is, the delegation of the judicial power, which is declared to extend "to all cases of admiralty and maritime jurisdiction." The other is, the delegation of the power "to regulate commerce with foreign nations, and among the several states;" and, as connected with these, the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," &c.

In regard to the first clause, the question which arises is, what is the true nature and extent of the admiralty jurisdiction. Does it, in cases where it is independent upon locality, reach beyond high-water mark? Our opinion is, that in cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide-waters, as far as the tide flows; and that it does not reach beyond high-water mark. It is the doctrine, which has been repeatedly asserted by this court; and we see no reason to depart from it. Mixed cases may arise, and indeed often do arise, where the acts and services done are of a mixed nature; as where salvage services are performed, partly on tide-waters, and partly on the shore, for the preservation of the property saved; in which the admiralty jurisdiction has been constantly exercised, to the extent of decreeing salvage. That this is a rightful exercise of jurisdiction by our courts of admiralty, was assumed as the basis of much of the reasoning of this court, in the case of the *American Insurance Company* v. *Canter*, 1 Pet. 511. It has also been asserted and enforced by Lord STOWELL, on various occasions; and especially in the case of *The Augusta & Eugenie*, 1 Hagg Adm. 16; *The Jonge Nicholas*, Ibid. 201; *The Ranger*, 2 Ibid. 42; and *The Happy Return*, *Ibid. 198. See also, *The Henry of Philadelphia*, 1 Ibid. 264; *The Vesta*, 2 Ibid. 189; *The* [*77 *Salacia*, 2 Ibid. 262. And this has been done, not only in conformity to the doctrines of the maritime law; but also to what has been held in the courts of common law. For it has been laid down, that if the libel is founded upon one single continued act, which was principally upon the sea, though a part was upon land; as if the mast of a ship be taken upon the sea, though it be afterwards brought ashore, no prohibition lies. Com. Dig., Adm. F. 5; 1 Roll Abr. 533, L. 13; Com. Dig., Adm. E. 12. It is true, that it has been said, that the admiralty has not jurisdiction of wreck of the sea. 3 Bl. Com. 106, 107. But we are to understand by this, not what, in the sense of the maritime and commercial law, is deemed wreck or ship-

wrecked property; but "wreck of the sea," in the purely technical sense of the common law; constituting a royal franchise, and a part of the revenue of the crown in England; and often granted, as such a royal franchise, to lords of manors. How narrow and circumscribed this sort of wreck is, according to the modern doctrines of the courts of common law, may be perceived by the statement of it in Mr. Justice Blackstone's Commentaries. (1 Bl. Com. 290–317.) Who also shows, that it is this, and this only, which is excluded from the admiralty jurisdiction. Lord STOWELL manifestly acted upon the same doctrine, in the case of *The Augusta & Eugenie*, 1 Hagg. Adm. 17; 3 Bl. Com. 106–7.

A passage has been sometimes relied on, in one of the earliest judgments, of Lord STOWELL—the case of *The Two Friends*, 1 Rob. 271, in which it is intimated, that if the goods, which are subject to salvage, have been landed, before the process of the admiralty court has been served upon them, the jurisdiction over them, for the purposes of salvage, may be gone. But his lordship, so far from deciding the point then, greatly doubted it; and has, as it should seem, since silently overruled the objection. Indeed, the supposed difficulty in that case was not that the instance court had not jurisdiction; but that in cases of salvage on the instance side of the court, no process of the court could be served on land, but only on the water. Now, this is wholly inapplicable to the courts of the United States, where admiralty process, both on the instance and prize side of the court, can be served on land as well as on water. These explanations have been made, for the sake of clearing the case from some apparent obscurities and difficulties, as to the nature and extent of the admiralty *jurisdiction, in cases where it is limited by the locality of the acts done. In our judgment, the authority of congress, under this clause of the constitution, does not extend to punish offences committed above and beyond high water mark.

*78]

But we are of opinion, that, under the clause of the constitution giving power to congress "to regulate commerce with foreign nations, and among the several states," congress possess the power to punish offences of the sort which are enumerated in the ninth section of the act of 1825, now under consideration. The power to regulate commerce includes the power to regulate navigation, as connected with the commerce with foreign nations and among the states. It was so held and decided by this court, after the most deliberate consideration, in the case of *Gibbons* v. *Ogden*, 9 Wheat. 189–98. It does not stop at the mere boundary line of a state; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts, done on land, which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states. Any offence which thus interferes with, obstructs or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. No one can doubt, that the various offences enumerated in the ninth section of the act, are all of a nature which tend essentially to obstruct, prevent or destroy the due operations of commerce and navigation with foreign nations, and among the several states. Congress have, in a great variety of cases, acted upon this interpretation of the constitution, from the earliest period after the constitution; as will be abundantly seen by the punishment of

certain offences on land, connected with piracies and felonies on the high seas, in the act of 1790, ch. 36, § 10 and § 11; and in the acts for regulation of commerce and navigation, and for the collection of the revenue, passed from time to time; in which many of the penalties, forfeitures and offences provided for, are such as are, or may be, done on land; and yet which arise from the power to regulate commerce and navigation, and to levy and collect duties. The ship registry act of 1792, ch. 45; the act of 1793, ch. 52, for the enrolment and licensing of vessels in the coasting trade and fisheries; the act of 1790, ch. 102, for the regulation and government of seamen in the merchants' service; and the revenue collection act, from the act of 1789, ch. 5, to *that of 1799, ch. 128, afford many pointed illustrations. We do not hesitate, therefore, to say, that in our judgment, the present [*79 section is perfectly within the constitutional authority of congress to enact; although the offence provided for may have been committed on land, and above high-water mark.

Let us now proceed to the interpretation of the section under consideration. Does it mean, in the clause on which this indictment is founded, to prohibit and punish the plundering, stealing or destroying of any property belonging to any vessel in distress, or wrecked, lost, stranded or cast away, only when the same property is then on board of the vessel, or is then upon the sea, or upon any reef, shoal, bank or rock of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States? Or does it mean equally to prohibit and punish such plunder, or destroying of such property, whether the act be done on shore, or in any of the enumerated places below high-water mark. In our opinion, the latter is the true interpretation of this clause of the section.

In the first place, that is the natural meaning of the words of the clause, taken in their actual import and connection. There is no absolute locality assigned to the offence. It is not said, as it is in every one of the preceding sections, that the offence shall be committed in a particular place, in a fort, dock-yard, navy-yard, &c., or upon the high seas, or in an arm of the sea, or in a river, &c., within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state. The language is, "if any person or persons shall plunder, steal or destroy any money, goods, merchandise, or other effects, from or belonging to any ship or vessel, &c." The plundering, stealing or destroying need not, then, be *from* any ship or vessel. It is sufficient, if it be of property "belonging to any ship or vessel." It is nowhere stated, that this property, belonging to any ship or vessel, shall be in any of the enumerated places, when the offence is committed; but only that it shall be property belonging to the ship or vessel which is in distress, or wrecked, lost, stranded or cast away. Locality, then, is attached to the ship or vessel, and not to the property plundered, stolen or destroyed. And this qualification is important, because it is manifest, that congress possess no authority to punish offences of this sort, generally, when committed on land; but only to punish them when *connected with foreign trade and navigation, or with trade and [*80 navigation among the several states.

In the next place, the mischiefs intended to be suppressed by the section are precisely the same, whether the offence be committed on the land, or below high-water mark. There is, and there can be, no sound reason why

congress should punish the offence when committed below high-water mark, which would not apply equally to the offence when committed above high-water mark. In such case, the wrong and injury to the owners, and to commerce and navigation, is the same ; and the public policy of affording complete protection to property, commerce and navigation, against lawless and unprincipled freebooters, is also in each case the same. There is, then, no reason, founded in the language or policy of the clause, to insert a restriction and locality which have not been expressed by the legislature. On the contrary, upon general principles of interpretation, where the words are general, the court are not at liberty to insert limitations not called for by the sense, or the objects, or the mischiefs of the enactment.

In the next place, the succeeding clauses of the same section greatly aid and fortify this construction ; for in neither of them is there any locality given to the offences therein stated ; and indeed, any locality would seem inconsistent with the professed objects of these clauses. Thus, in the next clause, it is provided, that " if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life, from such ship or vessel, &c.," he shall be punished in the manner provided for in the section. Now, it is plain, that this obstruction may be as well by an act done on shore, as by an act done below high-water mark. It may be by cutting a rope, or hawser, or other thing used as a means of escape, and fastened to the shore : or by removing a plank affixed at one end to the shore ; or by striking or wounding a person, on his arrival at the shore ; or by intimidating him from landing, by threatening to fire on him on landing, or otherwise, by attempting, on shore, to prevent him from saving his life. But the remaining clause is still more direct. It provides for the case of holding out or showing a false light, or extinguishing a true light, with the intention to bring any ship or vessel, &c., sailing upon the sea, into danger, or distress or shipwreck. Now, it is most manifest, that these acts are such as ordinary are done, and contemplated to be done, on land. We do not say contem-
*81] plated, exclusively, to be done on land ; for they may be done on *the sea. But to suppose, that congress could intend to punish these acts only when done on the sea, and not to punish them when committed on shore, would be to suppose that they were solicitous to punish acts of possible and rare occurrence only ; and to leave unpunished those which would be of the most frequent and constant occurrence, for such inhuman purposes ; and most mischievous in their consequences.

If, then, the other clauses of the same section, defining offences of a kindred nature, have no reference whatever to any locality, but indifferently apply to the same offence, whether committed on land or on the sea ; and if (as is the fact) all these clauses are connected together, and must be read together, in order to arrive at the denunciation of the punishment, which is equally applied to all ; there does seem to us to be very strong reason to believe, that congress, throughout the whole enactment, had the same intent, an intent to punish all the enumerated offences, whether committed on land or on tide-waters ; because they were equally within the same mischief, and the prohibitions were equally necessary to the protection of the commerce and navigation of the United States.

It has been suggested, that there is not the same necessity for the interposition of congress in the case of the offence contained in the present

indictment, when committed on land, as when committed on the sea, or in other places within the admiralty and maritime jurisdiction of the United States; because when committed on land, the offence is, or may be, cognisable by the state judicatories, under the state laws. But this reasoning is equally applicable to the other offences enumerated in the other clauses of the same section; and yet it can hardly be doubted, that they were designed to be punished, when committed on land. And it may be further suggested, that it could scarcely be deemed prudent or satisfactory, wholly to rely upon state legislatures or state laws, for the protection of rights and interests specially confided by the constitution to the authority of congress.

Independently, however, of these considerations, there are others, which ought to have great weight, and, in our opinion, decisive influence, in a question like the present. In the first place, the act of 1825, ch. 276, manifestly contemplates, that in some of the offences enumerated in it, the state courts would or might have a concurrent jurisdiction; for the 23d section of the act expressly provides, "that nothing in this act contained shall be construed to deprive the courts *of the individual states of jurisdiction, under the laws of the several states, over offences made punishable by this act." Now, there are no other sections in the act, to which this last section can more pertinently apply than to offences committed on land, within the ninth section. It does, indeed, apply with equal force to the 23d section of the act (which is also derived from the power to regulate commerce), which provides for the punishment of conspiracies, combinations and confederacies, "on the high seas, or within the United States," to cast away, burn or otherwise destroy any ship or vessel, for the fraudulent purposes stated in the section; and also affixes a like punishment to the building or fitting out, aiding in the building or fitting out, "within the United States," of any ship or vessel, with intent that the same shall be cast away, burnt or destroyed, for the like purpose. [*82

In the next place, it is a most important consideration, that in cases of shipwreck, there must always be great practical difficulties in ascertaining the precise place, whether below or above high-water mark, where the property is first plundered, stolen or destroyed; as well as, by direct evidence, to identify the particular persons by whom the offence was committed. These dreadful calamities usually occur upon coasts, and in places, where the officers and crew are total strangers to all the inhabitants. The personal sufferings of the officers and crew often disable them from making any efforts, or giving any care or aid, in the preservation of the property, The hurry and confusion incident to such events, make them intent upon consulting their own safety, and often absorb all their thoughts. The darkness of the night, as well as the perils of the weather, often compethem to forego all resistance to the depredators; and the latter often assemble in numbers so large as to make opposition hopeless, and identification of individuals and of packages impracticable. While some are on the waves, bringing the plunder to the shore; others are or may be on the shore, stationed to guard and secure the booty. Under such circumstances, if the jurisdiction of the courts of the United States were limited to acts of depredation or destruction, committed below high-water mark, the enactment would become practically almost a dead letter; for in most cases, it would be impossible to establish, by direct proof, that the property was

taken below high-water mark. A prosecution in the state court would, in many cases, be equally liable to a failure, from the utter impossibility of establishing, whether the act was not committed within the admiralty and
*83] maritime jurisdiction of the United *States. The wisdom of the enactment, therefore, which, upon a prosecution in the courts of the United States, should cut off any defence founded upon the mere absence of such proof, where the offence was committed, would seem to be as clear, as its policy is obvious. It could scarcely escape the attention of the legislature, as indispensable for the due administration of public justice. And so far from wondering, that the section in question does not contain any restriction as to locality of the offence, the surprise would have been great, if it had been found there. We think ourselves justified in saying, that, upon the true interpretation of the section, it contains no such restriction; and that there is no ground, in constitutional authority, in public policy, or in the nature or object of the section, which calls upon us to insert any.

Upon the whole, our opinion is, that it be certified to the circuit court for the southern district of New York, that the offence committed was within the jurisdiction of that court.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the question and point on which the judges of the said court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress, in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, upon the point which has been certified to this court, by the said circuit court, that the said offence, so committed, was within the jurisdiction of the said circuit court; and it is ordered and adjudged, that this opinion be certified to the said circuit court accordingly.

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*84] *John McNiel, Plaintiff in error, *v.* Lowell Holbrook.

Evidence.—Admissions of parties.—State laws.—Damages in error.

In an action on four promissory notes, one of which was made by the defendant, in favor of the plaintiff, and the others were made by the defendant, in favor of other persons, who had indorsed them to the plaintiff, parol evidence was properly admitted, that the defendant acknowledged that he was indebted to the plaintiff in the amount of the notes, and offered to confess judgment, in the course of a negotiation with the plaintiff's counsel, although the negotiation fell through; and although no proof was given of the handwriting or signatures of the indorsers of the notes. This case does not come within the reason or principle of the rule, which excludes offers to pay, made by way of compromise upon a disputed claim, and to buy peace.[1]

The court is not bound to give any hypothetical direction to the jury, and to leave them to find a fact, where no evidence of such fact is offered, nor any evidence from which it can be inferred.

The admissions of a defendant, that he is indebted to the plaintiff on promissory notes, when

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[1] The admission of an independent fact, though made in an offer of a compromise, is evidence. Sailor *v.* Hertzog, 2 Penn. St. 182; Arthur *v.* Jones, 28 Id. 236; Marvin *v.* Richmond, 3 Den. 58; Bartlett *v.* Tarbox, 1 Keyes 495. And see Unthank *v.* Travellers' Ins. Co., 4 Biss. 357.

proved by competent testimony, are sufficient evidence of the transfer of negotiable paper, without proof of the handwriting of the payee; whether the evidence was legally competent for that purpose, or not, is a question for the court, and not for the jury, in the absence of all contradictory testimony.[2]

By the act of the legislature of Georgia, of 15th December 1810, the assignment or indorsement of a promissory note is made sufficient evidence thereof, without the necessity of proving the handwriting of the assignor. The judiciary act of 1879 declares, that the laws of the several states, except when the constitution, treaties or statutes of the United States require otherwise, are to be rules of decision, in the courts of the United States, in trials at common law, where they apply. The court does not perceive any sufficient reason for construing this act of congress so as to exclude from its provisions those statutes of the several states, which prescribe rules of evidence in civil cases, in trials at common law.

The object of the law of congress was to make the rules of decision of the courts of the United States the same with those of the states; taking care to preserve the rights of the United States, by the exceptions contained in the section of the judiciary act; justice to the citizens of the United States required this to be done; and the natural import of the words used in the act of congress, includes the laws in relation to evidence, as well as the laws in relation to property.[2]

The court refused to allow ten per centun per annum, interest, as damages for suing out the writ of error, in this case, on the amount of the judgment in the circuit court, under the 17th rule of the court; the case was not considered as one where the writ of error was sued out merely for delay.

Error to the Circuit Court of Georgia. In the circuit court of the United States for the district of Georgia, Lowell Holbrook instituted an action on four promissory notes; one *of which was made by the [*85
plaintiff in error, in favor of Lowell Holbrook, and the three other notes were made in favor of other persons, who had indorsed the same over to Mr. Holbrook. An affidavit of the agent of the plaintiff, stating that the defendant, John McNiel, was indebted to Lowell Holbrook in the amount of the said notes, was filed with the declaration.

Issue being joined in the suit, the plaintiff, to support the action, without having proved the handwriting of the maker of the notes, or of those who had indorsed three of the notes to him, offered the testimony of W. W. Gordon, Esq., the counsel of the plaintiff, to prove "that John McNiel had, repeatedly, and as late as November 1st, 1835, admitted his indebtedness upon those promissory notes; and at the same time, offered to confess a judgment for the amount of principal and interest, upon certain terms, by which he was to be allowed time for the payment of part. The negotiation continued until November 3d, 1836; and then was only not completed, from the inability of John McNiel to pay the cash, which he had, in the first instance, offered." The defendant objected to admission of this evidence and insisted, that the acknowledgment was only an offer by the defendant to buy his peace, by a compromise made in the course of a negotiation, for the settlement of the claim of Lowell Holbrook; which said compromise and negotiation having failed, the acknowledgment could not be given in evidence, to sustain the claim of the plaintiff. The defendant also objected to the evidence, as the plaintiff had declared against the defend-

[1] See Payson *v.* Coolidge, 2 Gallis. 233; Wallace *v.* Hussey, 63 Penn. St. 24; Hyde *v.* Stone, 7 Wend. 354.

[2] Wilcox *v.* Hunt, 13 Pet. 378; Vance *v.* Campbell, 1 Black 427; Hauseknecht *v.* Claypool, Id. 431; Wright *v.* Bales, 2 Id. 535; Ryan *v.* Bindley, 1 Wall. 66; Potter *v.* National Bank, 102 U. S., 163; Fowler *v.* Hecker, 4 Bl. C. C. 425 And see 1 R. S. § 852.

ant as indorser of promissory notes alleged to have been made by certain persons to him, he was bound to prove the indorsement of the notes by the said persons; and the court could not dispense with the proof of the indorsements. The court refused to give the instructions, as asked by the defendant; and instructed the jury, that the evidence offered and admitted was sufficient to entitle the plaintiff to recover against the defendant.

The jury having found a verdict for the plaintiff, according to the instructions of the court, and judgment having been entered thereon; the defendant prosecuted this writ of error.

The case was submitted to the court by *Mr. King;* who also moved the court to allow damages to the defendant in error, at the rate of ten per centum per annum, according to the 17th rule of the court; which allows such damages, when a writ of error is sued out for delay.

*86] *Taney, Ch. J., delivered the opinion of the court.—This case comes up upon a writ of error directed to the circuit court for the district of Georgia. An action of *assumpsit* was brought in that court, by Lowell Holbrook against John McNiel, to recover the amount of four promissory notes made by the defendant; one of them payable to Lowell Holbrook, and three to other persons who had indorsed them to the said Holbrook, who was the plaintiff in the court below. The plaintiff declared on the promissory notes; and did not insert in the declaration any of the usual money counts. The defendant pleaded the general issue; and at the trial of the case, the plaintiff offered to prove, by a competent witness "that John McNiel had repeatedly, and as late as the first of November (the trial took place on the 11th of that month), admitted his indebtedness upon these four promissory notes; and at that time, offered to confess a judgment for the amount of principal and interest, upon certain terms, by which he was to be allowed time for the payment of part. The negotiation continued until the third of November, and was then only not completed from John McNiel's inability to pay the cash, which he had, in the first instance, offered." The counsel for the defendant objected to the admissibility of this evidence, upon the ground, that it was merely an offer on the part of the defendant to buy his peace, in the course of a negotiation for the settlement of the claim of the plaintiff, which had failed. The objection was overruled by the court, and the evidence given to the jury; the defendant excepted to this opinion of the court.

The notes (which were indorsed in blank), together with the evidence above stated, was the only testimony given in the cause. The plaintiff offered no evidence to prove the handwriting of the maker or indorsers; and no evidence was offered by the defendant. The defendant thereupon moved the court to instruct the jury: 1st. That the evidence given on the part of the plaintiff, was not sufficient to entitle him to recover on the three notes, on which he had declared as indorsee; without proving the indorsements of the payees mentioned in the said notes. 2d. That if the jury believed the acknowledgment above mentioned to have been made by the defendant, in the course of a negotiation with a plaintiffs, or his attorney, for a compromise, which had failed; and for the purpose of buying his

*87] peace by such compromise; that such acknowledgment was not sufficient to entitle the plaintiff to recover on the three *notes, on which

he sued as indorsee, without proving the indorsement of the payees. A third prayer was also made, which is the same in substance with the first. The court refused to give the instructions asked for by the defendant, and directed the jury, that the evidence was sufficient to entitle the plaintiff to recover. To these opinions and to the instruction of the court, the defendant excepted; and the case has been brought here for the revision of this court.

We think the circuit court was right in admitting the evidence above stated. There does not appear to have been any dispute between the parties, as to the amount due on the notes, nor as to the plaintiff's right to receive it. The negotiation, as disclosed in the testimony, was altogether concerning the time of payment, and not in relation to the amount to be paid; and the defendant, in the course of that negotiation, admitted the debt, and offered to confess judgment for it, in the suit then pending, provided time was given to him for the payment of a part. This was the acknowledgment of a fact by the defendant, and not an offer to buy his peace, and we think the testimony was properly received; although the admission was made pending a negotiation to enlarge the time of payment. The case does not come within the reason or the principle which excludes offers to pay, made by way of compromise upon a disputed claim, and to buy peace.

We concur also with the circuit court, in the instructions given to the jury, after the testimony was admitted. The plaintiff was in possession of the notes indorsed in blank; the admission of the defendant of his liability for the amount, and his offer to confess a judgment, was an admission of the plaintiff's right to the money due on the notes; and consequently, was an acknowledgment that he was the maker of the notes, and that they had been legally transferred to the plaintiff. There could, therefore, be no necessity for proving the indorsements; because that proof would have established nothing more than what had already been proved by the admissions of the defendant. For, he could not have been indebted to the plaintiff on these notes, unless he was the maker of them, and unless they had also been legally transferred to the plaintiff. This view of the subject disposes of the first and third instructions, asked for by the defendant.

As relates to the second prayer, the court would unquestionably have been bound to give it, if there had been any testimony from which the jury could have inferred that the admission in question *was made as an offer of compromise, and to buy his peace. But we see nothing in [*88
the evidence from which such an inference could have been drawn. There does not appear to have been any negotiation concerning the amount of the debt, or the plaintiff's right to receive it; and the court is not bound to give an hypothetical direction to the jury, and to leave it to them to find a fact, where no evidence of such fact is offered, nor any evidence from which it can be inferred. Such being the case here, we think the court did not err in refusing this direction.

The same reasoning applies to the direction which the court gave. If there had been any evidence conducing to prove the fact insisted on by the defendant, the jury were certainly the proper judges of its sufficiency; and the court could not, without encroaching on the province of the jury, have instructed them on that point. But there was no contradictory testimony,

nor any question in relation to the credibility of the witness. The facts, as stated by him, were not controverted; and in this state of the evidence, the counsel for the defendant, in his third prayer, moved the court to instruct the jury, that the acknowledgment so proved was not sufficient to entitle the plaintiff to recover, without proof of the indorsements of the payees. The point thus presented to the circuit court, was upon the legal sufficiency of the evidence; the counsel for the defendant insisting, that notwithstanding the admissions of the party, that he owed the money on the notes, and his offer to confess a judgment to the plaintiff for the amount, yet the law required the plaintiff to go further, and to prove the indorsements of the payees, before he could entitle himself to recover. In other words, the point was raised, whether the admission of a defendant, when proved by competent testimony, are sufficient evidence of the transfer of negotiable paper, without proof of the handwriting of the payee. It is an answer to this prayer, that the court instructed the jury that the evidence was sufficient. The question submitted to the court was one of law; and turned upon the legal sufficiency of evidence of a certain description to establish a particular fact. And whether it was legally sufficient for that purpose or not, or whether the law required higher or different evidence, was a question for the court and not for the jury. The point had, in effect, been decided by the opinion of the court on the defendant's first prayer; and was properly and correctly decided.

There is another ground upon which, we think, that the court *were right in refusing to instruct the jury, that it was incumbent on the plaintiff to prove the indorsement on the notes purporting to have been made by the payees. By an act of the legislature of Georgia, passed on the 15th of December 1810 (Prince's Digest of the Laws of Georgia, p. 144), it is enacted, "that in all cases brought by any indorsee or indorsees, assignee or assignees, on any bill, bond or note, before any court of law or equity in this state, the assignment or indorsement, without regard to the form thereof, shall be sufficient evidence of the transfer thereof; and the said bond, bill or note shall be admitted as evidence, without the necessity of proving the handwriting of the assignor or assignors, indorser or indorsers; any law, usage or custom to the contrary notwithstanding." In a suit, therefore, in the state courts, there would have been no necessity for proving the handwriting of the indorsers; and the indorsements themselves would have been *primâ facie* evidence that the notes in question had been transferred to the plaintiff; he being in possession of the notes, and the indorsements of the payees appearing thereon in blank. *89]

The 34th section of the judiciary act, establishing the courts of the United States (1789, ch. 20), provides, "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply." We do not preceive any sufficient reason for so construing this act of congress as to exclude from its provisions those statutes of the several states which prescribe rules of evidence, in civil cases, in trials at common law. Indeed, it would be difficult to make the laws of the state, in relation to the rights of property, the rule of decision in the circuit courts, without

associating with them the laws of the same state, prescribing the rules of evidence by which the rights of property must decided. How could the courts of the United States decide whether property had been legally transferred, unless they resorted to the laws of the state, to ascertain by what evidence the transfer must be established? In some cases, the laws of the states require written evidence; in others, it dispenses with it, and permits the party to prove his case by parol testimony; and what rule of evidence could the courts of the United States adopt, to decide a question of property, but the rule which the legislature of the state has prescribed? The object of the law of congress was to make the *rules of decisions in the courts of the United States, the same with those of the states; [*90 taking care to preserve the rights of the United States by the exceptions contained in the same section. Justice to the citizens of the several states required this to be done; and the natural import to the words used in the act of congress, includes the laws in relation to evidence, as well as the laws in relation to property. We think they are both embraced in it; and as, by a law of Georgia, the indorsement on these notes was made *primâ facie* evidence that they had been so indorsed by the proper party, we think the circuit court were bound to regard this law as a rule of evidence. It dispensed with the proof which the defendant insisted on; and the circuit court, on that ground, were right in refusing the prayers of the defendant, which required proof of these indorsements. Upon the production of the notes, the plaintiff was entitled to recover, without the aid of the parol evidence; which is the subject of all the defendant's exceptions. For this reason, independently of the principles herein before stated, we think the judgment of the circuit court below ought to be affirmed.

The defendant in error has moved the court to allow him ten per cent. damages, under the 17th rule of the court, which provides, that when a writ of error shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per cent. per annum, on the amount of the judgment. We do not consider this case as one of that description; and therefore, award nothing more than the ordinary interest of six per cent.

Baldwin, Justice, dissented.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Georgia, and was argued by counsel: On consideration whereof, it is adjudged and ordered by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

*The Mayor, Recorder, Aldermen and Common Council of Georgetown, Appellants, *v.* The Alexandria Canal Company and William Turnbull, Appellees.

Compacts between states.—Equity jurisdiction of nuisance.

A bill was filed by the corporation of Georgetown, on behalf of themselves and the citizens of Georgetown, against the Alexandria Canal Company, stating that the company were constructing an aqueduct across the Potomac river, within the corporate limits of Georgetown; that the Potomac was a public highway; and that the free use of the river was secured to all persons residing on the border of the river, or interested in its navigation, by the compact of 1785, between Virginia and Maryland; the aqueduct, with the works of the Alexandria Canal Company, the bill stated, obstructed the navigation of the river, and injured the owners of wharf property on the same; the bill asked an injunction to stay the further proceedings of the defendants, and for other relief. The Alexandria Canal Company, incorporated by congress, denied the right of the corporation of Georgetown to interfere in the matter; denied that their works were within the corporate limits of Georgetown; and that the court had jurisdiction to interfere, or could restrain them from prosecuting their works under their charter; averring they have not transcended the power granted to them by congress, on the 26th of May 1830. The circuit court dismissed the bill; and on an appeal to the supreme court, the decree of the circuit court was affirmed.

The compact between Virginia and Maryland, in 1785, was made by the two states, in their character of states; the citizens, individually, of both commonwealths, were subject to all the obligations, and entitled to all the benefits, conferred by that compact; but the citizens of each, individually, were, in no just sense, the parties to it; these parties were the two states of which they were citizens. The same power which established it, was competent to annul or to modify it; Virginia and Maryland, if they had retained the portions of territory which respectively belonged to them, on the right and left banks of the Potomac, could have so far modified this compact, as to have agreed to change any or all of its stipulations; they could, be their joint will, have made any improvements which they chose; either by canals along the margin of the river; or by bridges or aqueducts across it; or in any other manner whatsoever. When they ceded to congress the portions of the territory embracing the Potomac river within their limits, whatever the legislatures of Virginia and Maryland could have done by their joint will, after that cession, could be done by congress, subject only to the limitations imposed by the acts of cession.

The act of congress, which granted the charter to the Alexandria Canal Company, was in no degree a violation of the compact between the states of Virginia and Maryland; or of any of the rights that the citizens of either, or both states, claimed as being derived from it.

The Potomac river is a navigable stream, or part of the *jus publicum*; and any obstruction to its navigation would, upon the most established principles, be a public nuisance. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is, by indictment or information, by which the *nuisance may be abated, and the person who caused it may be punished. A court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney-general and if any particular individual have sustained special damage from the erection of it, he may maintain a private action for such special damage; because, to that extent, he has suffered beyond his portion of injury, in common with the community at large.[1]

*92]

While it is admitted by all, that the jurisdiction of a court of equity, in cases of nuisance, is confessedly one of delicacy, and accordingly, the instances of its exercise are rare; yet it may be exercised in those cases in which there is imminent danger of irreparable mischief, before the tardiness of the law could reach it.

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[1] It is well settled, that a court of chancery will not restrain an act which, though illegal, affects the whole community, unless the plaintiff make out a case of special damage. Irwin *v.* Dixion, 9 How. 10; Railroad Co. *v.* Ward, 2 Black 485; Works *v.* Junction Railroad, 5 McLean 425; Railroad and Canal Co. *v.* St. Louis, 2 Dill. 70; Davis *v.* New York, 14 N. Y. 506; Sparhawk *v.* Union Passenger Railway Co., 54 Penn. St. 401.

There are cases in which it is competent for some persons to come into a court of equity as plaintiffs, for themselves and others having similar interests; such is the familiar example of what is called a creditors' bill. But in all these cases, the parties have an interest in the subject-matter, which enables them to sue; and the others are treated as a kind of plaintiffs with those named, although they themselves are not named.[1]

APPEAL from the Circuit Court of the District of Columbia, and county of Washington. The appellants filed their bill in the court below, in July 1836, stating, in substance, that they were deeply interested in the trade and navigation of the Potomac river, a common highway, the unobstructed use of which was secured by a compact, in 1786, between the states of Virginia and Maryland. That the appellees, under the alleged authority of an act of congress of the 26th of May 1830, were engaged, at Georgetown, and within its corporate limits, in constructing an aqueduct over the said river. That the said aqueduct was designed to rest on massive stone piers, having their foundation on the solid rock at the bottom of said river. That to build said piers, coffer-dams are used around the site of them, with a double row of piling, the inner and outer rows of piling twelve or thirteen feet apart. That the appellees had finished one pier. That in building it, they filled up the space between the inner and outer rows of piling with clay and earth. The appellants expressed fears that the clay so used, would injure the harbor of the town, and channel of the river; but they were assured by the appellees that the clay so used, on completing the pier, should be taken away, and not permitted to be swept into the harbor and river. The bill further stated, that, in the construction of the second pier, then in progress, the appellees not only used clay between said rows of piling, but threw large masses of clay and earth into the open river, outside the outer row of piles; that the current of said river and freshets, to which it was subject, had swept and *would sweep said clay and earth into the channel and harbor; and had materially injured and would injure said channel and harbor. That the appellants had expended large sums of money (in part granted to them by congress) in deepening the channel of the river, below the town; and that the depth of water had been materially lessened, caused in part, and materially, by the said works of the appellees. [*93

The bill further stated, that the appellants, before filing their bill, remonstrated against the use of said clay and earth in the open river, outside the dams, to the officer in charge of the work; but he asserted his right so to use it, and would use it, when the safety of his works, in his judgment, required; and was so instructed by his principals. The bill further stated, that the appellants had reason to believe, and did believe, that the said operation would be renewed, in the construction of the six or more remaining piers of the aqueduct, if not arrested by the order of the court; to the manifest injury, if not ruin, of their harbor and channel. The bill further averred, that the appellees were without sufficient means to complete the work, and called for a statement of their funds. The bill also averred the charter of the appellees, of May 1830, to be unconstitutional, because it obstructed navigation. It prayed a perpetual injunction against the appellees in the use of clay and earth, inside or outside the dams; and against the progress of the

[1] See Railroad Co. v. Ellerman, 105 U. S. 166, 174.

work so conducted, in which they were engaged; and for further relief, &c.

The answer denied the right of the appellants to sue, and the jurisdiction of the court to enjoin for a public nuisance, and to give the relief prayed; denied that there was any injury or damage; and if any, that it was within the corporate limits of Georgetown; and averred the validity of the act of congress, of 26th May 1830, and their right to proceed under it. The answer averred, that the said charter was granted with the knowledge and acquiescence of Georgetown; that a large amount of money had been obtained and expended on the work; and that the appellees confidently believed, an ample amount had been, and would be, furnished to complete it. They further averred, that they had employed skilful and scientific engineers; that they had adopted the most approved plan (as set forth in the bill); and that if any injury had occurred, or should occur, to the river or harbor of Georgetown, which they denied, it was the necessary and inevitable result of the work itself. The answer admitted, that in building the second pier, in consequence of a freshet in June 1836, alleged to have swept off the original
*94] deposit at the bottom *of the river round the pier, and thereby loosening the outer piles of the dam, they did throw in clay outside the outher rows of piles, to replace said deposit; that it was necessary to do so, and the only practicable means to save their work; that it was an emergency not likely again to arise; and that it did not, and could not, produce the mischiefs alleged and apprehended by the complainants. To so much of the bill as averred the financial inability of appellees to complete the work, and called for a development of their resources, they demurred.

Proof was taken on both sides, and filed with the bill and answer; the general replication filed, and the cause, by consent, set for final hearing. The court below refused to grant the injunction, and the relief prayed, and dismissed the bill; and the appelants thereupon appealed to this court.

The case was argued by *Key*, for the appellants; and by *Coxe* and *Jones*, for the appellees.

For the appellants, it was contended: 1. That the court erred in refusing to grant the relief prayed for. 2. Because a wanton and irreparable injury to the navigation of the river, results from the manner of the defendants' construction of their work. 3. Because, by the compact between Maryland and Virginia, of 1786, and by the act of cession, of 1791, the free navigation of the river Potomac, and the rights of the citizens of Maryland and Virginia, and of the district, were secured. 4. If the charter authorizes the erection of works which destroy the rights and property of the complainants, it is void, as against the constitution of the United States; no compensation being provided for such injuries by the charter.

Barbour, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court for the United States for the county of Washington, in the district of Columbia, dismissing the appellants' bill. The appellants filed their bill in the court below, in behalf of themselves and the citizens of Georgetown, against the appellees; containing various allegations, the material parts of which, are substantially these:

That the appellees, who were defendants in the court below, had

been, and then were, engaged in constructing an *aqueduct over the Potomac river, at Georgetown, within its corporate limits, immediately above and west of the principal public and private wharves of the town; that the Potomac river, above and below the aqueduct, continuously outward to the sea, was a public navigable highway; that the free use of that river was secured to all the people residing on its borders, or interested in its navigation, by a compact between the states of Virginia and Maryland, in the year 1785; that Georgetown derived its chief support and prosperity from the trade of the Potomac; that large sums of money had been expended by the complainants, at the wharves of the town, in deepening the water on the bar across the main channel, immediately below the town, and north and west of the long bridge across the Potomac; that the defendants had constructed one massive stone pier, and were about to construct others; that by the use of clay and earth thrown in, to make close certain coffer-dams, used by the defendants in the construction of the piers, the harbor has been injured, and the depth of water in the cut or channel through the bar below the town, has been diminished already, and that they apprehend serious injury in future from the same causes; that by the construction of their piers of stone, and in such a way as greatly to increase the force of the current, other earth and mud have been, and will be, washed down by the velocity of the current, so as to injure the wharves and harbor of the town, and impair the navigation of the river. The bill charges, that the aqueduct can be constructed without the use of clay and earth, from which so much injury is apprehended. It proceeds to state, in minute detail, the nature and character of the injury apprehended to the harbor, wharves and navigation; and concludes with a prayer for an injunction prohibiting the defendants from further depositing earth and clay in the Potomac river, outside or inside their coffer-dams, or otherwise, to the injury of the navigation of the river and the harbor of Georgetown; and with a prayer also for general relief.

The defendants answered, denying that the complainants, the corporation of Georgetown, had any right, title or interest in the waters of the Potomac river, which they aver to be a public navigable river, and a common highway; they deny that the works, in the construction of which they are engaged, are within the corporate limits of Georgetown; they deny the right of the corporation of Georgetown to file the bill in behalf of the citizens of the town; they deny the jurisdiction of a court of equity over nuisances in public rivers *and highways; and also its power to enjoin them from the prosecution of the works in which they are engaged, under their [*96
charter; they insist, that congress had full power to grant to them the charter of incorporation, and to authorize the construction of the works in which they are engaged. They aver that they have not transcended the power conferred by their charter, which was granted to them by an act of congress, passed on the 26th of May 1830, which they exhibit as part of their answer. They then proceed to answer the bill at large upon its merits.

It is unnecessary to state the evidence in the case; because our opinion is founded upon considerations, independent of the facts which that evidence was intended to prove. We shall forbear also from any expression of opinion upon some of the topics discussed at the bar; because, whilst

they are important in their character, they have no bearing upon the principles on which our judgment proceeds. We will now very briefly state them, and the conclusions which necessarily flow from them.

The compact made in the year 1785, between Virginia and Maryland, was made by the two states, in their character as states. The citizens, individually, of both commonwealths, were subject to all the obligations imposed, and entitled to all the benefits conferred by that compact. But the citizens, as such, individually, were in no just sense the parties to it; those parties were the two states, of which they were citizens. The same power which established it, was competent either to annul or modify it. Virginia and Maryland, then, if they had retained the portions of territory respectively belonging to them on the right and left banks of the Potomac, could have so far modified this compact as to have agreed to change any or all of its stipulations. They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever. When they ceded to congress the portion of their territory, embracing the Potomac river, within their limits, whatsoever the legislatures of Virginia and Maryland could have done by their joint will, after that cession, could be done by congress, subject only to the limitations imposed by the acts of cession. We are satisfied, then, that the act of congress, which granted the charter to the Alexandria Canal Company, is in no degree a violation of the compact between the states of Virginia and Maryland, or of *any rights that the citizens of either or both states claimed as being derived from it.

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Congress, then, having the power, authorized the Alexandria Canal Company "to cut canals, erect dams, open feeders, construct locks, and perform such other works as they shall judge necessary and expedient, for completing a canal, from the termination or other point on the Chesapeake and Ohio Canal, to such place in the town of Alexandria, as the board of directors shall appoint." Now, as one of its *termini* was authorized to be, either the termination or some other point on the Chesapeake and Ohio Canal, and the other, some place in the town of Alexandria; and as the Potomac lies between these *termini;* the authority to construct an aqueduct was granted *ex necessitate.* But if certainty required to be made more certain, this is done by the language of the 9th and 14th sections of the act of May 26th, 1830, granting the charter; in both of which, the term aqueducts is used, in such a manner as incontestably to prove, that congress considered the power to construct them as given by the charter. If, then, as we have said, congress had power to authorize the construction of an aqueduct across the Potomac; if so having the power, they have given to the Alexandria Canal Company the authority to construct it; and if, in the construction, that company has not exceeded the authority given them, either in the thing done, or in the manner of doing it, so as to produce the least injury or inconvenience practicable, consistently with the execution of the work; it would be difficult, as a legal proposition, to predicate of such a work, that it was unlawful, or that it was a nuisance; so as to justify a court in interfering to prevent its progress towards completion.

It is unnecessary, however, to prosecute this inquiry, because there is a view of the subject which we think decisive of the case. Were it even

admitted, that the canal company had exceeded the authority under which they are acting, nevertheless, as the Potomac river is a navigable stream, a part of the *jus publicum*, any obstruction to its navigation would, upon the most established principles, be what is declared by law to be a public nuisance. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated ; and the person who caused it may be punished. If any particular individual shall have sustained special *damage from the erection of it, he may maintain a private action [*98 for such special damage ; because to that extent he has suffered beyond his portion of injury in common with the community at large. 5 Bac. Abr. Nuisance, B. p. 51 ; 2 Ld. Raym. 1163.

Besides this remedy at law, it is now settled, that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney-general. This jurisdiction seems to have been acted on with great caution and hesitancy. Thus, it is said by the chancellor, in 18 Ves. 217, that the instances of the interposition of the court were confined and rare. He referred, as to the principal authority on the subject, to what had been done in the court of exchequer, upon the discussion of the right of the attorney-general, by some species of information, to seek, on the equitable side of the court, relief as to nuisance, and preventive relief. Chancellor KENT, in 2 Johns. Ch. 382, remarks, that the equity jurisdiction, in cases of public nuisance, in the only cases in which it had been exercised, that is, in cases of encroachment on the king's soil, had lain dormant for a century and a half ; that is, from Charles I. down to the year 1795. Yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all, that it is confessedly one of delicacy ; and accordingly, the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief, before the tardiness of the law could reach it.

The court of equity also, pursuing the analogy of the law, that a party may maintain a private action for special damage, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance, at the instance of a private person ; where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy. Amongst other cases, this doctrine is laid down in the case of *Crowder* v. *Tinkler*, 19 Ves. 616. In that case, p. 622, the chancellor says, " Upon the question of jurisdiction, if the subject was represented as a mere public nuisance, I could not interfere in this case, as the attorney-general is not a party ; and if he was a party, upon the *dicta*, unless it was clearly a public nuisance generally, the court would not interpose by injunction, until it had been tried at law. The complaint is, therefore, to be considered as of not *a public nuisance simply ; but what, being [*99 so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including, also, danger to their existence ; and on such a case, clearly established, I do not hesitate to say, an injunction would be granted." The principle is also distinctly asserted and acted on by Chancellor KENT, in the case of *Corning* v. *Lowerre*, 6 Johns. Ch. 439. In that case, a bill was filed for an injunction to restrain the

defendant from obstructing Vestry street, in the city of New York, and averring that he was building a house upon that street, to the great injury of the plaintiffs, as owners of lots on and adjoining that street; and that Vestry street had been laid out, regulated and paved for about twenty years. The injunction was granted; the chancellor said, that here was a special grievance to the plaintiffs, affecting the enjoyment of their property and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs. The principle then is, that in case of a public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity, unless he avers and proves some special injury.

With this principle as our guide, let us now examine the pretensions of the appellants in this case. Who are they? Not, indeed, a private person, but a corporation. They profess to come into court for themselves and for the citizens of Georgetown. Now, it is not even pretended, that in their character of a corporation only, they have any power or authority given to them by their charter, to take care of, protect and vindicate in a court of justice, the rights of the citizens of the town, in the enjoyment of their property, or in removing or preventing any annoyance to it. Nor does such a power attach to them in their corporate character, upon any principle of the law in relation to corporations. The complainants, then, must, as in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, have averred and proved, that they were the owners of property liable to be affected by the nuisance, and that, in point of fact, were so affected, so as that they thereby had suffered a special damage. Now, there is no such averment in this bill. The appellants seem to have proceeded on the idea, that it appertained to them, as the corporate
*100] authority in *Georgetown, to take care of and protect the interests of the citizens. In this idea, we think they were in error; and that they cannot, upon any principle of law, be recognised as parties competent in court to represent the interests of the citizens of Georgetown. Nor is the difficulty obviated, by associating with them the citizens of Georgetown, as persons in whose behalf they sue. There are, indeed, cases, in which it is competent for some persons to come into a court of equity, as plaintiffs, for themselves and others having similar interests; such is the familiar example of what is called a creditors' bill. But in that, and all other cases of a like kind, the persons who, by name, bring the suit, and constitute the parties on the record, have themselves an interest in the subject-matter, which enables them to sue, and the others are treated as a kind of co-plaintiffs with those named, although they themselves are not named: but in this case, it has been already said, that the appellants have no such interest as enables them to sue in their own name, and consequently, the whole analogy fails. Moreover, if the citizens of Georgetown were even parties on the record, the objection would equally lie against them, unless they could show a special damage as a ground to stand upon.

With these views, we are of opinion, that the decree of the court below, dismissing the appellants' bill, is correct; it is, therefore, affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and

for the county of Washington, and was argued by counsel: On consideration whereof, it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Francis West and others, Appellants, *v.* Walter Brashear. [*101

Practice.

A defendant in an appeal, using the copy of the record received from the circuit court lodged by the appellant, cannot have the appeal docketed and dismissed, under the 30th rule of the court; on the ground, that the appellant has failed to comply with the 37th rule, which requires a bond to be given to the clerk of the supreme court, before the case is docketed; he must, to sustain a motion to dismiss the cause, produce the certificate of the circuit court, stating the cause, and certifying that such an appeal has been duly sued out and allowed.

Appeal from the Circuit Court of Kentucky.

On a motion of Mr. *Crittenden*, counsel for the defendant, to dismiss the appeal.

Taney, Ch. J., delivered the opinion of the court.—In this case, an appeal has been taken from the decree of the circuit court for the eighth circuit, and a copy of the record in due form has been lodged by the appellants with the clerk. But the case has not been docketed, because the appellants have not filed the bond to secure the fees to the clerk of this court, prescribed by the rule No. 37, adopted at January term 1831. Upon the record brought here as above mentioned, the appellee has moved the court for leave to docket and dismiss the case, under the 30th rule. We think this cannot be done. The appellee, upon producing the certificate from the clerk of the circuit court, as required by the 30th rule of this court, stating the cause, and certifying that such an appeal had been duly sued out and allowed, will be entitled to have the case docketed and dismissed. But this cannot be done on the record brought here by the appellants. The motion is, therefore, overruled.

Motion overruled.

*George Beaston, Garnishee of the Elkton Bank of Maryland *v.* The Farmers' Bank of Delaware.

Priority of the United States.

From the language employed in the fifth section of the act of congress of March 3d, 1797, giving a priority to debts due to the United States, and the construction given to it by the supreme court, these rules are clearly established: 1st, That no lien is created by the statute; 2d, the priority established can never attach, while the debtor continues the owner, and in the possession of the property, although he may be unable to pay all his debts; 3d, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section; 4th, whenever the debtor is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay the debt first, out of the proceeds of the debtor's property.

All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the act of congress; and it is manifest, that congress intended to give priority of payment to the United States over all other creditors, in the cases stated therein. It, therefore, lies upon those who claim exemption from the operation of the statute, to show that they are not within its provisions.[1]

Corporations are to be deemed and considered *persons*, within the provisions of the fifth section of the act of congress of 1797; and the priority of the United States exists as to debts due by them to the United States.

An attachment, at the suit of the Farmers' Bank of Delaware, was issued against the effects of the Elkton Bank, on the 24th of September 1830, and under it, were attached the funds of the Elkton Bank in the hands of one of its debtors; on the 8th day of July 1831, an attachment was issued at the suit of the United States, the United States being creditors of the Elkton Bank, and it was laid on the same funds which had been previously attached at the suit of the Farmers' Bank of Delaware; the money thus attached by the Farmers' Bank of Delaware, in the hands of a debtor to the Elkton Bank, by legal process, before the issuing of the attachment in behalf of the United States, was bound for the debt for which it was first legally attached, by a writ in the nature of an execution; and the right of a private creditor, thus acquired, could not be defeated by the process subsequently issued at the suit of the United States. If the district court of the United States had a right to appoint receivers of the property of an insolvent bank which is indebted to the United States, for the purpose of having the property of the bank collected and paid over to satisfy the debt due to the United States by the bank; this would not be a transfer and possession of the property of the bank, within the meaning of the act of congress; and the right of the United States to a priority of payment, would not have attached to the funds of the bank.

The legislature of Maryland passed an act authorizing the stockholders of the Elkton Bank to elect trustees, who were to take possession of the funds and property of the bank, for the purpose of discharging the debts of the bank, and distributing the residue of the funds which might be collected by them, among the stockholders; this, had the law been carried into effect, was not such an assignment *of all the property of the bank, as would entitle the United States to a priority of payment out of the funds of the bank.

*103]

No one can be divested of his property, by any mode of conveyance, statutory or otherwise, unless, at the same time and by the same conveyance, the grantee becomes invested with the title. The moment the transfer of property takes place, the person taking it, whether by voluntary assignment, or by operation of law, becomes, under the statute, bound to the United States for the faithful performance of the trust. The cases of the United States *v.* State Bank of North Carolina, 6 Pet. 29; United States *v.* Amedy, 11 Wheat. 392; United States *v.* Fisher, 2 Cranch 358; United States *v.* Hooe, 3 Ibid. 73; Price *v.* Bartlett, 8 Ibid. 431; Conrad *v.* Atlantic Insurance Co., 1 Pet. 439; Conard *v.* Nicoll, 4 Ibid. 308; Brent *v.* Bank of Washington, 10 Ibid. 596; and Hunter *v.* United States, 5 Ibid. 173, cited.

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[1] In the Cook County National Bank *v.* United States, 107 U. S. 445, it was determined, that the statute giving priority to the United States, does not apply to its demands against an insolvent national bank.

Beaston v. Farmers' Bank.

ERROR to the Court of Appeals of the Eastern shore of Maryland. This suit was commenced in the Cecil county court of the state of Maryland, in September 1830, by an attachment issued at the instance of the Farmers' Bank of Delaware, against the Elkton Bank of Maryland. To this writ the sheriff, in October 1830, returned, that he had attached goods and chattels, rights and credits of the defendants, the Elkton Bank of Maryland, in the hands of George Beaston, to the amount of $500, to the use of the plaintiffs in the attachment. In April 1834, the counsel for the plaintiffs, and for Mr. George Beaston, agreed on the following statement of facts:

It is agreed, that in 1828, the United States instituted suit against the Elkton Bank, in the circuit court of the United States; at the December session 1829, a verdict and judgment were rendered in said suit, in favor of the United States, for $21,200; on which judgment, a *fi. fa.* was issued to April term 1830, and returned *nulla bona;* but it is admitted, that, at that time, the said president and directors of the Elkton Bank had a large landed estate, which has since been sold, and applied to satisfy, in part, the said judgment; which landed estate, together with all other effects or property belonging to the bank, would not enable the bank to pay its debts; and that the said property and effects are insufficient to pay the said debt due to the United States; and it is admitted, that the bank was then unable to pay its debts. An appeal to the supreme court of the United States was prosecuted, but no appeal bond given; and the judgment was affirmed in the supreme court *at the January term 1832. At the April term 1830, of the circuit court, a bill in equity [*104 was filed against the said bank, at the suit of the United States; and Nathaniel Williams and John Glenn were appointed, by an order of court, receivers, with authority to take possession of the property of the said bank, to dispose of the same, and to collect all debts due to it. The proceedings by the United States against the Elkton Bank, and the acts of the receivers, Mr. Williams and Mr. Glenn, were made a part of the agreement as to the facts of the case.

At December session 1829, application was made to the legislature of Maryland, by the several persons who were the acting president, and the acting directors of the said bank, for the act which was passed at that session, ch. 170; which, with all other acts relating to said bank, are to be considered as part of this statement. The act of the legislature of Maryland authorized the appointment of trustees, by the stockholders of the Elkton Bank, on certain notice of the meeting of the stockholders being given; who were to take posession of the whole of the property of the Elkton Bank, and to proceed to the adjustment of its concerns. A meeting of the stockholders was convened on the 17th day of May 1830, which was the third Monday of said month, but without the publication of the notice mentioned and required in the act incorporating the bank and its supplements; and at the said meeting, a majority of the stockholders appointed two trustees, in conformity to the provisions of said act, who declined accepting; and no trustees have ever been since appointed, nor has there since been an annual or other meeting of the stockholders, or an election of directors; nor have there been any banking operations carried on by any persons professing to be the corporation of the Elkton Bank, since March 1829. At September term 1828, the Elkton Bank obtained a judgment against George Beaston, for the sum which is attached in this [illegible] at the time of the issuing

and service of this attachment, had not been paid by Beaston. At April term 1830, the Farmers' Bank of Delaware obtained, in Cecil county court, a judgment against the president and directors of the Elkton Bank, for $5000, with interest from 9th of December 1825, till paid, and costs; and before the appointment and bonding of the receivers aforesaid, and on the 24th of September 1830, upon that judgment, issued this attachment; and attached in the hands of the said Beaston, the sum of $500; and after this attachment was issued and served, and after *the affirmation of the judg- *105] ment of the circuit court by the supreme court, an attachment was issued by the United States, and the other proceedings had, as appeared by the records of the circuit and supreme courts of the United States, which were made part of the case. Beaston has actually paid and satisfied the United States, the amount for which judgment of condemnation was rendered against him in the circuit court. It is admitted, that, up to the time of the decision in the supreme court, the said receivers never had collected and received, or by any process of law attempted to collect or receive, the said debt attached in this case. The question for the opinion of the court is, whether the plaintiff can sustain the present attachment?

By the record of the proceedings in the circuit court of the United States for the district of Maryland, it appeared, that upon the judgment obtained in December 1829, against the Elkton Bank of Maryland, the United States, on the 2d of July 1831, issued an attachment against the effects of the Elkton Bank; which attachment was laid on the effects of the bank, in the hands of George Beaston, on the 19th of October 1831.

The answers to the interrogatories filed on behalf of the United States by George Beaston, stated "that prior to the time of laying the attachment in this cause, he was indebted to the Elkton Bank of Maryland, in the sum of $500, or thereabout, with interest from some time in 1828 (the period not now exactly recollected), that in October, in the year 1830, an attachment at the suit of the Farmers' Bank of Delaware against this deponent, as garnishee of the Elkton Bank of Maryland aforesaid, was served on him, returnable to Cecil county court, where the said attachment last mentioned is still depending; that, at the time of the service of the attachment in this cause, at the suit of the United States, the said sum of $500 and interest, was in the hands of deponent, and still remain so; who claims to retain the same, as he is held liable to the payment of the attachment first served on him, at the suit of the Farmers' Bank of Delaware aforesaid; and as he considers himself entitled to a set-off, as is hereinafter stated. Deponent further says, that he does not exactly recollect the time when said debt was contracted, as he has had various negotiations with said bank; but that, at the time he received money from said bank as a consideration for his debt, it was received in the notes of the said Elkton Bank; which were then, as he believes, in a state of depreciation of from ten to twenty per cent. on their nominal value." *That since the service of the summons in *106] this cause, he has not paid to the Elkton Bank aforesaid, or to any other person, for the use of the said corporation, any part of the money aforesaid; nor has he made any transfer of goods, property or effects, to secure the payment thereof, or any part thereof; that he is the *bonâ fide* holder and owner of notes of the Elkton Bank aforesaid, of the value nominally of $842.31; and he claims to set-off against any demand made

in this, or any other proceeding against him, for the debt aforesaid, so many of the said notes, at their nominal value, as may be equal to the sum claimed from him in this attachment, as garnishee of said bank.

George Beaston also filed a plea of *nulla bona*, in the following words: "That the said United States of America, condemnation of the said sum of money in the attachment aforesaid, and return thereof specified in the hands of him, the said George Beaston, as of the goods, chattels and credits of the said president and directors of the Elkton Bank of Maryland, ought not to have; because he said, that the said George Beaston, at the time of laying the said attachment in the hands of him, the said George Beaston, he had not, nor at any time since hath had, nor now hath, any of the goods, chattels or credits of them, the said president and directors of the Elkton Bank of Maryland, in his hands; and this he is ready to verify. Wherefore, he prays judgment whether the said United States of America, condemnation of the said money in the attachment aforesaid, and return thereof specified, as of the goods, chattels and credits of the said president and directors of the Elkton Bank of Maryland, in the hands of him, the said George Beaston, to have, ought, and so forth."

The United States filed a replication to this plea, and issue being joined, the parties went to trial on the pleadings; and a verdict was found by the jury in favor of the United States, for $685.66.

On the case thus agreed on, and the matter set forth and referred to in the same, the Cecil county court gave a judgment in favor of George Beaston; and the plaintiffs appealed to the high court of appeals of the state of Maryland. The judgment of the court of Cecil county was reversed by the court of appeals of Maryland; and the defendant prosecuted this writ of error to the supreme court of the United States. The opinion of the court of appeals of Maryland, states the *reasons which induced that court to reverse the judgment of the court of Cecil county. It was as follows: [*107

"Exemption is claimed by the defendant, from the operation of the attachment in this case. Having had judgment of condemnation passed against him, for the amount he stood indebted to the Elkton Bank of Maryland, at the suit of the United States, and having paid the money under such judgment, he rests his defence upon an alleged priority given by the acts of congress to the government; and upon certain proceedings of the government had in the circuit court of the United States for the district of Maryland, for the recovery of his claims against the Elkton Bank of Maryland. The priority of the United States is supposed to be founded on the just construction of the laws of congress, making provision for the collection of her debts. We have been referred, in the argument, to the law of 1789, ch. 5, § 21; 1790, ch. 35, § 45; 1792, ch. 27, § 18; 1797, ch. 74, § 5; and the collection law to be found in the 3d vol. of the Laws of the United States, ch. 138, § 65. Interpretations of various decisions of the supreme court of the United States, and of the circuit courts, have been given to these acts of congress, which leave no doubt as to their construction. It will be, therefore, only necessary to refer to them. The first two acts above cited had reference to bonds given for duties; and the third act above referred to, mado provision in relation to the securities in such bonds. These acts gave a preference to the United States in all cases of insolvency,

or where any estate in the hands of executors or administrators, shall be insufficient to pay all the debts of the deceased; and it was declared, that the case of insolvency referred to, should be deemed to extend to all cases in which a debtor, not having a sufficient property to pay all his debts, should have made a voluntary assignment thereof for the benefit of his creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law; or to cases in which an act of legal bankruptcy shall have been committed: and by the two subsequent laws, the same provision was made, securing the priority of the United States, and applying them to all other debts due to the United States. In the year 1805, the supreme court were first called upon to put a construction upon these laws; and it was adjudged in 3 Cranch 73, that the United States would gain no priority, in the case of a partial *bonâ fide* transfer of his property by the debtor; but could only obtain it by such a general divestment of property as would, in fact, be equivalent
*108] *to insolvency, in its technical sense. In 1810, the same court decided that the term "insolvency," as used in the first acts, and "bankruptcy," as used in the latter acts, are synonymous terms. That priority must be confined to the cases of insolvency specified in the act; and that insolvency must be understood to mean a legal, known insolvency, manifested by some notorious act of the debtor, pursuant to law; not a vague allegation which, in adjusting conflicting claims of the United States, and individuals against debtors, it would be difficult to ascertain. 8 Cranch 431. The same construction has been maintained in 2 Wheat. 396, and 4 Pet. 386; and in a very recent case, Mr. Justice THOMPSON says, "the act looks to a legal insolvency, where the property is taken up by the law, for distribution among the creditors of the debtor." There is no difficulty in the construction of the statute, until we arrive at the last phrase, "legal bankruptcy." What is legal bankrutcy? In 1797, when the act of congress was passed, the United States had no bankrupt laws. The words, in their connection, seem to have reference to the previous cases put in the section and to point out some legal insolvency or some mode of proceeding, by which the property of the debtor is taken out of his hands to be distributed by others. 1 Paine 629. Such being the construction of the acts of congress, giving the government a preference; we proceed to inquire, whether the Elkton Bank was in such a situation as to impart to the United States this preference.

"The above facts demonstrate the inability of the Elkton Bank to pay her debts, as admitted in the statement; they could not, *per se*, give to the United States the preference contended for. It must, in the language of the authorities, be a known and legal insolvency; the former of which is not admitted, and the latter could not be predicated of such a condition. Does the act of 1829, ch. 170, with the proceedings consequent thereon, give rise to the priority contended for? This act provided for the election, at the next annual meeting of the stockholders, held in pursuance of their charter, of two trustees, to settle all the outstanding debts and credits of the bank; and further provided, that they should be elected in the same manner as the president and directors have been theretofore elected. By referring to the charter of the bank, it will be found, that one of its fundamental laws required the president and directors to give one month's notice, in

the most public places in *the county, and in some public print in the city of Baltimore, of the time and place of holding the election of directors, annually; and it was furthermore, by a supplement to the said charter, required, that the election for directors should take place on the fourth Monday of May. If it were conceded to the legislature, that they possessed power to wind up the concerns of this particular institution by such an act, it must be admitted, that the leading provisions of the act, calculated to apprise all interested of the fundamental changes about to be operated in its government, that they might have an opportunity of protecting their interests, by their presence, should have been complied with, in order to give legal efficacy to the acts done under it. So far, however, from this, we are informed by the statement, that no notice was given; and that two persons were elected by a majority of the stockholders, on a different day from the day of the annual election of directors, as the trustees, who never accepted. So that the law was, in truth, never executed, but the proceedings held under it were undoubtedly inoperative and void, and could, therefore, not in any manner have operated as a general divestment of property, within the contemplation of the acts of congress, as upon this ground to have given the United States a preference; but on the contrary, the charter still thereafter continued to exist, and its affairs were, or ought to have been, rightfully managed and controlled by its then directors, who would continue in office, for its government, and the exercise of its corporate functions, until such election should take place. Although no priority may exist on the part of the United States, it has been argued, that the appointment of receivers, by the circuit court of the United States, to take charge of the property and effects of the Elkton Bank of Maryland, placed the debt due from the defendant so under the control of that court, as a court of equity, that it could be reached legally by no process of execution or attachment. It is true, that money and effects in the hands of the assignee of a bankrupt, or the trustee of an insolvent debtor, cannot be attached; not only because such property stands assigned by operation of law; but because the allowance of such attachments would utterly defeat the whole policy of the bankrupt or insolvent laws; nor can money taken by a sheriff in execution, or money paid into court. Serg. on Attach. 99. But we apprehend, that the appointment and bonding of receivers, does not work such disability. The property, by the order, is not taken under the protection of the court; and until taken in charge by the receivers, its summary jurisdiction could not be interposed to *punish such as might cover it, or portions of it, by execution or attachment. The period when it might [*110 and ought legally to be considered as under the mantle of legal protection, should be the time when a court of chancery would interpose by attachment for disturbing or interfering with the possession of the receiver. Innocent third persons might be previously affected, by extending this doctrine farther.

"It has been argued, and we think with much force, that there is and ought to be an analogy in this respect between the law applicable to receivers and sequestrators; as regards the latter, the court of king's bench have decided, that when a sequestration is awarded, to collect money to pay a demand in equity, if it is not executed, that is, if the sequestrators do not take possession, and a judgment-creditor takes out execution, notwithstanding the sequestration awarded, there may be a levy under the execution. 9 East 335.

So, here, the receivers never obtained possession of the credits of the Elkton Bank of Maryland, its books and papers, or its evidences of debt; on the contrary, so far as we are enabled to collect the fact in this respect from the record, they were held adversely; the circuit court of the United States giving their aid and assistance to the receivers, to enable them to obtain the possession; with what effect, we know not; except that we are left to infer, from the fact of the attachment subsequently issued against the defendant by the United States, that they never did obtain possession. We are not informed by the record, that the receivers ever took any steps whatever to assume control over the debt which the defendant owed the Elkton Bank; on the contrary, they take out an attachment in the name of the United States, and serve it on the defendant as garnishee, long after the attachment issued, and served by the plaintiff in this case; and indeed, the statement admits that they never attempted to exercise a control over this debt.

"Lastly, it is urged, that the judgment of condemnation obtained against Beaston, by the United States, should operate as a bar against the recovery by the plaintiff in this case. It is undoubtedly a hardship on the defendant, to be compelled twice to pay the same debt, but it must be recollected, that the plaintiff had a prior attachment, which operated as a lien; and it would be a still greater hardship, that such plaintiff should lose his lien, thus legally acquired, by the judgment of a court, in a cause to which he was no party, and of which we have no evidence that he had in any manner any notice. If the defendant failed to take the proper *steps, in the predicament in which he was placed, to defend and protect his interests, it is but fair, that he should suffer the consequences. Had notice been given of this attachment by the United States, the plaintiff might have vindicated his rights, and had an opportunity of asserting his anterior lien; and of obtaining the decision of the appellate court, had it become necessary. Nor is it perceived, why it would not have been competent for the defendant, in this conflict of claims against him, to have brought the conflicting parties into chancery, where the rights and priority of each might have been adjudicated, without prejudice to him. But, least of all, would the defendant be entitled to avail himself of the judgment of the United States recovered against him, since, from the examination of the record of that suit, it appears, that his defence was taken solely on the plea of *nulla bona;* a defence which could certainly have been of no avail, when it appeared, by the answers filed in the interrogatories of the United States, that he was indebted to the Elkton Bank of Maryland; although, in the answers, he adverts to the attachment issued against him by the Farmers' Bank of Delaware, he has not pleaded such prior attachment as pending against him, whereby he could obtain the opinion of the court in relation to its priority. In every aspect, therefore, in which we can view the decision below, we are brought to the conclusion that it cannot be sustained. Judgment reversed, and judgment on the case stated for appellant."

*111]

The case was argued at the bar, by *Martin* and *Butler*, Attorney-General, for the plaintiff in error: and by a printed argument, for defendants in error, by *John C. Groome*. *Butler* also submitted a printed argument, in reply.

For the plaintiff in error, the following points were presented to the

court. 1st. That, according to a just construction of the acts of congress giving priority to the United States, in cases where their debtors are insolvent, the government was entitled to be paid the debt due to it from the Bank of Elkton, out of the effects of that institution, in preference to any other creditor; and the plaintiff in error having paid to the United States the amount of money in which he was indebted to the Bank of Elkton, he was, therefore, acquitted from the operation of the attachment sued out against him by the Farmers' Bank of Delaware. *2d. That judgment of condemnation having been obtained by the United States [*112 against the plaintiff in error, on an attachment in the circuit court for the district of Maryland, for the money in which he stood indebted to the Bank of Elkton; and he having paid that amount to the United States, under the authority of said judgment, it operates as a bar to the recovery sought against him by the defendant in error. 3d. That the appointment of receivers, by the circuit court, to take possession of the property and effects of the Bank of Elkton, as disclosed by the record, placed the debt due from the plaintiff in error to that bank, in the custody and under the control of the circuit court, as a court of equity; and that it could not be legally reached by the process of attachment issued in this case by the Farmers' Bank of Delaware.

Martin, for the plaintiff, stated, that this case had been brought up to this court, to settle principles by which, hereafter, future cases may be regulated; and thus, although the amount in controversy is small, the importance of the principles involved, will commend it to the consideration of the court. After stating the case, he proceeded to say, that the first point is the question of the right of priority of the United States, under the act of congress, under the circumstances which are presented by the record. According to the received construction of the act of congress of the 3d of March 1791, a body politic or corporate is within the meaning of the act. 2d. The Bank of Elkton having become insolvent, the priority of the United States attached; and the proceedings of the Farmers' Bank of Delaware could not operate against the rights of the United States, nor affect the debt due to the Elkton Bank in the hands of George Beaston.

The priority of the United States is fully settled in the case of the *United States* v. *Fisher*, 2 Cranch 385. In that case, it was decided, that the right of the United States to priority of payment of debts due to her, extends to all cases where any one is indebted to the government. The same principle will be found in *Field* v. *United States*, 9 Pet. 182. Where there has been an open act of insolvency, the priority attaches; whether suit is, or is not, instituted by the United States. 1 Paine 628. This priority may be enforced by an action of *assumpsit;* by a bill in equity; or by any other legal proceedings.

*It has been said in this case, in the courts of Maryland, that corporations are not within the provisions of the act of congress; [*113 because the persons who compose the corporation are merged in it. But this is denied, and it is maintained, that a corporation is a person within the law; and that a corporation is fully within the meaning and purpose of the law. Corporations are persons; they are so treated in all the laws and proceedings relative to taxation. 2 Inst. 697, 718. In the exposition of

the statute of Henry V., Lord COKE says: Every corporation is included in the term "inhabitant;" although the corporation is not named. In Cowp. 79, the court of king's bench decided, that a corporation comes in under the term "inhabitant." So also, in the case of the *Bank of the United States* v. *Deveaux*, 5 Cranch 61, it was held, that a corporation composed of citizens of one state, may sue a citizen of another state, in the courts of the United States. The same prineiple will be found in the opinion of Mr. Justice THOMPSON, when in the supreme court of New York, in the case of *The People* v. *Utica Ins. Company*, 15 Johns. 358.

A corporation being within the act of congress, if, before the attachment of the Bank of Delaware, the Elkton Bank had become insolvent, the priority of the United States had attached; what was the situation of the Elkton Bank? what are the evidences of its insolvency? This is shown by the return of *nulla bona* to the attachment against the bank; by the inability of the bank to discharge its debts. In fact, there were no banking operations by the bank after 1829; no meeting of the stockholders; and all its operations as a bank were arrested, because of its entire and absolute inability to pay its debts. In 1829, the corporation was at Annapolis, asking for a special act of insolvency; and on this application of the bank, the legislature passed an act, which authorized the appointment of trustees, who were to take possession of the whole property and effects of the bank, and wind up its whole concerns. (Maryland Laws of 1829, ch. 170, Harris's Compilation.) These acts combined, demonstrate, fully and unquestionably, the insolvency of the bank.

It is contended, 1st. That if there was no legal transfer of the effects of the bank to trustees, in consequence of the irregularity of the proceedings of the stockholders, or from ony other cause, this court will pronounce the bank to have been insolvent; because of its situation, and from its various acts, and the circumstances of the case. *2d. That if it is necessary there should be an assignment to constitute a legal insolvency, and thus to bring the case within the provisions of the act of congress, the corporation was completely denuded of all its property; and the act of the legislature of Maryland, of 1829, was an assignment of all the property of the bank. Cited, *Prince* v. *Bartlett*, 8 Cranch 431. The acceptance of the assignment is not necessary to show the insolvency of the assignor. In the court of appeals, it was conceded, that if trustees of the bank had been appointed, the insolvency of the bank would have been established. The irregularity of their appointment can have no influence on the question. It is the condition of the bank, and its application to the legislature, followed by the proceedings of the stockholders appointing the trustees (although not according to the requirements of the law), which make out the insolvency. The appointment of receivers by the circuit court of the United States for the Maryland district, was also a judicial assignment of all the effects of the bank. If a statutory assignment, or an individual assignment, gives the preference to the United States; why should not a judicial assignment have the same operation? As to the effect of the appointment of receivers: cited, 3 Wend. 1.

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The party, in this case, paid the money in obedience to the judgment of a court of competent jurisdiction. This is a full protection for the payment; and no other court can question the propriety of the judgment of

the circuit court of Maryland; or of the acts of the defendant in obedience to that judgment: cited, 5 Johns. 101; 2 East 266. It was said, in the court of appeals, that the Bank of Delaware might have appealed from the circuit court of the United States to this court. But there is error in this assertion. The sum in controversy was too small for a writ of error, or for an appeal.

It is claimed, that receivers having been appointed by the circuit court, in 1830, and they having entered on their duty, and assumed the trusts delegated to them; all the property and effects of the bank went into their hands, and no part of the same was afterwards liable to attachment. The attachment by the Farmers' Bank of Delaware was after the appointment of receivers in the circuit court. The receivers were appointed in June; the attachment was not laid until September.

It has been said, that the receivers did not take possession of the debt due by Beaston, the plaintiff in error; that they could have no manual possession of this debt. As to what an attachment is, and *what property can be attached: cited, 1 P. & W. 117; 1 Dall. 3; 3 Binn. 294; 2 Madd. Ch. 187, 294. [*115

Butler, upon the question, whether "person," in the act of congress, gave a priority to the United States, said; that wherever "person" is used in a statute, with a quality attached to it which does not apply to a corporation, the court will construe the statute so as to comprehend persons; if the spirit and purpose of the law will be accomplished by their doing so. Wherever the words of a statute can be extended to artificial persons, and where the acts done, or to be done, by corporations are within the spirit of the law, they will be extended to comprehend them. In all these cases, and wherever it is necessary, the court will look at the composition of the corporation. Persons, in law, are artificial as well as natural persons; and in the act of congress, there is nothing which is not equally applicable to both. The object of the statute was to include all persons. Its purpose was to secure debts due to it, from whomsoever might become indebted to the United States; and a corporation is certainly within the general sense of the statute.

As to the insolvency of the Elkton Bank, it was plain and manifest, at the time of the proceedings by the United States against Mr. Beaston. The act of congress applies to a case where the insolvency is manifest. What can manifest the insolvency of the bank more than what is shown in the record. The bank had ceased its operations as a bank; the stockholders had ceased to appoint directors to manage its concerns. An application was made in 1829, to the legislature of Maryland, for the appointment of assignees or trustees, who were to take possession of all its property; and this application was a full manifestation of the total insolvency of the institution.

Groome, for the defendants in error.—At April term 1830, of Cecil county court, the Farmers' Bank of Delaware obtained a judgment against the Elkton Bank of Maryland. On the 24th day of September following, it had an attachment issued on this judgment, in conformity with the laws of Maryland, 1715, ch. 40, § 7; and attached in the hands of Beaston, the plaintiff in error, the sum of $500, &c., due to the said Elkton Bank on a

judgment at September term 1828, of the same court. Beaston resisted
*116] this attachment, and a judgment was *rendered in his favor, against the Farmers' Bank, at April term 1834; on the statement of facts to be found on the 8th, 9th and 10th pages of the printed record. From this judgment an appeal was prayed to the court of appeals of Maryland, and there it was reversed. Subsequently, by a writ of error, it has been brought up to this court; and the question for decision is, whether, at the time of issuing and levying such attachment, there was any existing lien on behalf of the United States, or of any other creditor of the Elkton Bank, on the specific debt attached; or any other circumstance or relation between the Elkton Bank and any of its creditors, either then existing, or subsequently arising, which could overreach the attachment, and defeat its operation?

It cannot be contended, that the record discloses any lien existing at that time. The judgment rendered in favor of the United States against the Elkton Bank, could not operate as a lien on any debt due to the Elkton Bank. Neither was any such lien created by the *fieri facias* issued on that judgment, to April term 1830. It had already, on the 8th day of April 1830, been returned with an indorsement of *nulla bona*, by the marshal; and was, under no circumstances, the proper process of execution to reach the credits of the Elkton Bank, and could, of course, have no effect upon the debt due from Beaston. Nor could any priority (as will appear hereafter to be claimed on behalf of the United States) operate as a lien on this debt. This court has held, that no lien is created in favor of the United States by the law of priority. *United States* v. *Fisher*, 2 Cranch 358; *Conard* v. *Atlantic Insurance Company*, 1 Pet. 440; *United States* v. *Hooe*, 3 Cranch 73.

It is said, however, that although no actual lien may have existed in favor of the United States, or any other creditor of the Elkton Bank; yet the United States were, by reason of their judgment, and other circumstances stated in the record in this cause, entitled to a priority of payment out of the funds of the Elkton Bank; and this priority, existing at the time when the attachment was issued on the judgment of the Farmers' Bank, superseded and defeated that attachment. Supposing it to exist in this case, "what, then, is the nature of the priority thus limited and established in favor of the United States? Is it a right which supersedes and overrules the assignment of the debtor as to any property which afterwards the United States may elect to take in execution, so as to prevent such property
*117] from passing, by virtue of such assignment, to the assignees? *Or is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignees? We are of opinion (said this court), that it clearly falls within the latter description; and that the debts due to the United States are to be satisfied by the assignees, who are rendered personally liable, if they omit to discharge such debts." *Conard* v. *Atlantic Insurance Company*, 1 Pet. 439. Again, in the case of the *United States* v. *Fisher*, this court held, that no lien is created by this law of priority; no *bonâ fide* transfer of property in the ordinary course of business is overruled. It is only a priority of payment, which, under different modifications, is a regulation in common use. See 1 Pet. 440. It does not partake even of the character of a lien on the property of public debtors. *United States* v. *Hooe*, 3 Cranch 73. If, then, debts due to the United States constitute no

lien on the property of the debtor, and have merely preference of payment out of the debtor's funds in the hands of assignees; how can the existence of such debts operate to defeat any lien subsequently acquired by any other *bonâ fide* creditor? or, in other words, how can a debt due to the United States, and merely entitled to a priority of payment out of the funds of the Elkton Bank in the hands of its assignees, be held to defeat a lien on a specific credit, acquired in favor of the Farmers' Bank by attachment? It is a solecism to say, that such a debt, or such priority, is no lien; and yet give to it all the properties, attributes and effect of a lien. In this manner did this court reason, when it said, that "if a debtor of the United States, who makes a *bonâ fide* conveyance of part of his property, for the security of a creditor, is within the act which gives a preference to the government, then would that preference be in the nature of a lien, from the instant he became indebted." 3 Cranch 73. But it will be recollected, that the fund attached in this case was not chattels or land in the actual custody and under the immediate control of the Elkton Bank; but a *chose in action*, a debt due from a third person to that institution, under a judgment which, at the time of the attachment, had never been paid, and which required the use of coercive measures to reduce it into possession. It would seem to be carrying the principle of priority very far, to apply it to such a case. The third person cannot be presumed or expected to know the condition of his creditor's affairs; whether he be indebted to the United States or not; and whether, if indebted, the United States have any right to priority of payment out of his estate; and if he did know such to *be the condition [*118 of his creditor, he is in no wise responsible for the proper application of his creditor's property. The United States have their remedy against the assignees, and not against the property of their debtor. Their priority never attaches on lands or goods, as the lands or goods of the debtor; it attaches on the fund, and not on the specific property. It does not operate to prevent the passing of the property, either to assignees in bankruptcy, or to assignees under a conveyance, or to executors and administrators. It amounts only to a right to previous payment out of the fund then in the hands of others. Such was the argument of counsel, and such appears to be the effect of the decision in the case of *Conard* v. *Atlantic Insurance Company*.

So far the argument has proceeded on the hypothesis, that, in this case, a priority under the acts of congress in favor of the United States, did exist; but it is deemed, that the United States ever had such priority of payment against the Elkton Bank. The priority claimed is derived from certain acts of congress. These several acts are the act of 31st July 1789, ch. 5, § 21; the act of 4th August 1790, ch. 35, § 45; the act of 1792, ch. 27, § 18; the act of 3d March 1797, ch. 74, § 5; and the act of 2d March 1799, ch. 128, § 65. All of these acts, except that of 1796, confined the priority of the United States to custom-house bonds, and bonds taken under the collection act; and some of them placed the surety in such bonds, who paid the debt, on the same footing in respect to priority, as the United States. It was the act of 1797 that went further, and gave a preference to the United States in all cases whatsoever, whoever might be the debtor, or however he might be indebted; when the debtor became insolvent, or when, after his death, his estate in the hands of his executors or adminis-

trators should be insufficient for the payment of his debts; and it provided, that the priority should be deemed to extend as well to cases in which the debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof for the benefit of his creditors; or in which the estate and effects of an absconding, concealed or absent debtor shall have been attached by process of law; as to cases in which an act of legal bankruptcy shall have been committed. In giving a construction to these statutes, this court has held, that they only apply to two general classes of cases, viz: a living insolvent, having an assignee; and a dead insolvent, represented by executors or administrators (*Conrad* v. *Nicoll*, 4 Pet. 308): *119] that the priority, as against living debtors, *only existed where the debtor had become actually and notoriously insolvent, and being unable to pay his debts, has made a voluntary assignment of all his property; or, having absconded, or absented himself, his property has been attached by process of law. See *United States* v. *Hooe*, 3 Cranch 73; 1 Pet. 439. The words bankruptcy, and insolvency, mentioned in the statutes, are used as synonymous terms; and must be understood to apply to cases of insolvency specified by the legislature; and to mean a legal and known insolvency, manifested by some notorious act of the debtor, pursuant to law (*Prince* v. *Bartlett*, 8 Cranch 431); or where, by operation of law, the property of the debtor is taken out of his hands to be distributed by others (*United States* v. *Clark*, 1 Paine 629; and see *Thelusson* v. *Smith*, 2 Wheat. 396); or where the property is in the hands of assignees, not by voluntary assignment only, but by assignment made in virtue of any state bankrupt law, or, possibly, of any bankrupt law of the United States, which might hereafter be passed. *Conrad* v. *Nicoll*, 4 Pet. 308. It is not a mere inability of the debtor to pay all his debts, but that inability must be manifested in one of the three modes pointed out in the explanatory clause of the section. 1 Pet. 439.

From the several statutes and decisions cited, it appears, that the United States, as creditors, have a preference in the following cases: 1. Where the debtor is dead, leaving an insufficiency of assets in the hands of his executors or administrators to pay his debts. 2. When his effects have been attached by process of law, as an absent, concealed or absconding debtor. 3. Where there is bankruptcy, or legal insolvency, of the debtor, manifested by some act pursuant to law; and 4. Where he has made a voluntary assignment of all his property for the benefit of his creditors. Did the Elkton Bank, at the time of issuing the attachment in favor of the Farmers' Bank, come within either one of these four classes?

1. It was, certainly, at that time, an existing institution, in the full possession of its chartered rights and powers; and could not be even assimilated to the condition of a deceased debtor. The failure of the stockholders of the Elkton Bank to elect officers in 1830, and since, even with their continued omission to carry on their usual banking operations, could be regarded, in the worst aspect, as only cause of forfeiture, and is not, *per se*, an *120] actual forfeiture. A corporation may *forfeit its charter, under certain circumstances, by non-user or misuser of its franchises; but such forfeiture can only be enforced by judicial proceedings instituted for that purpose, at the instance of the government; and no cause of forfeiture can be taken advantage of, collaterally or incidentally; nor indeed, in any man-

ner, until the default has been judicially ascertained and declared, by a suit instituted on behalf of the state for that purpose. *Chesapeake and Ohio Canal Company* v. *Baltimore and Ohio Railroad Company*, 4 Gill & Johns. 107; *Trustees of Vernon Society* v. *Hills*, 6 Cow. 23; *King* v. *Amery*, 2 T. R. 515. Besides, it is the general principle of law, that it is incident to all corporations, that in case of a failure to elect at the time appointed, the old officers shall remain in office. 1 Str. 625; 10 Mod. 146. One of the supplements to the charter of the Elkton Bank contains a provision to the same effect. Laws of Maryland, 1815, ch. 148: see 6 Gill & Johns. 230. But this point is too self-evident to require further discussion.

2. There has been no attachment of the effects of the Elkton Bank, as an absent, concealed or absconding debtor. The attachment of the Farmers' Bank, in this case, is a process in the nature of an execution: is, as such, authorized by the laws of Maryland, 1715, ch. 40, § 7: and is not predicated of the absence or concealment of the debtor, the Elkton Bank.

3. Here was no known and legal insolvency; none admitted in the statement of facts, and none arising by inference therefrom; but a mere inability to pay debts; which is not the insolvency contemplated by the acts of congress, and does not, *per se*, give to the United States the preference claimed. 1 Pet. 439. The insolvency mentioned in the statutes, refers to insolvency under the state laws, and perhaps, to a bankrupt law of the United States, when one should pass. 4 Pet. 307–8; *Prince* v. *Bartlett*, 8 Cranch 431. And a corporation is not within the state laws on that subject (*State of Maryland* v. *Bank of Maryland*, 6 Gill & Johns. 221); being incapable of imprisonment; or of availing itself of the benefit of their provisions.

4. Here was no voluntary assignment by the Elkton Bank, for the benefit of its creditors. No such assignment is expressly admitted, and none such can be implied. The act of the legislature of Maryland, 1829, ch. 170, cannot be deemed to be such an assignment. By that act, the stockholders of the Elkton Bank were merely authorized, at their next annual meeting, held in pursuance of their *charter, to elect two persons as trustees, who [*121 should have power to adjust and settle all the outstanding debts and credits of said bank; who should be privileged to sue, and be liable to be sued; and be elected in the same manner as the president and directors had been, and in their place and stead. A charter being a contract, within the purview of the constitution, which cannot be destroyed, modified, altered or impaired, without the assent of the corporators; this act, unless accepted and executed by the stockholders of the Elkton Bank, in the manner and on the terms prescribed by it, is a mere dead letter. It can make no difference, that it was passed on the application of the several persons, who were the acting president and the acting directors of the bank; for it is not conceded, that they acted officially; and if they did, they acted without authority, and in the exercise of powers that did not legitimately belong to their office.

And it is contended, too, that on principle, the acceptance must be the act of each corporator; for if it be a contract at all, it must be a contract with each. If not, and a majority of corporators can control the objects and purposes of the charter; then, after the creation of a charter for one purpose, and the contribution of the requisite funds for that purpose, a majority may, with the aid of the legislature, divert the funds from the object for which they have been subscribed by many; and apply them to a use opposed to

their wishes, and destructive to their interests. At all events, it must be accepted and executed, either by a majority, or by the whole of the corporators; and in either case, the acceptance must be made in accordance with the act. The annual meeting of the stockholders had been fixed by law (1815, ch. 148), to take place on the fourth Monday of May, in every year; and the charter required the president and directors to give one month's notice, in the most public places in the county, and is some public print in the city of Baltimore, of the time and place of holding the election of directors, annually. (Laws of Maryland, 1810, ch. 51, § 27, pl. 3.) Now, the fourth Monday of May 1830 (after the proper preliminary notice had been given) was the day when the next annual meeting would be held, in pursuance of the charter; and if any inference of the acceptance or execution of the act of 1829 can be drawn from the conduct of the stockholders, in the absence of any express resolution to that effect, it should be derived from their election of trustees, in conformity with that act on that day. On that day, however, no such election was attempted; but on a different day viz., *122] *on the third Monday of May, without any previous notice whatever, and without any authority, two persons were elected by a majority of the stockholders, as trustees; but these persons never accepted. The act of 1829 was, therefore, never regularly accepted, and never executed, and all the proceedings under it, being unauthorized, were necessarily void, and could not operate as a general divestment of the property of the Elkton Bank, within the contemplation of the acts of congress, so as to give the United States the preference over other creditors.

The effects of the Elkton Bank never went into the hands of any persons for distribution; the trustees elect refused the office; and there was, therefore, no assignee to whom they were assigned, or who could be made liable to the United States. The contingency whereon the transfer was to be made under the act, viz., the substitution of trustees in the "place and stead" of directors, did not happen. The transfer was, therefore, never consummated. An act of bankruptcy, or what would be such under the bankrupt laws of England, is not sufficient to give rise to the preference of the United States, from the moment of its commission; for there is no assignee, who is first to satisfy the claim of the United States out of the estate of the debtor, under the penalty of satisfying it out of his own estate. 4 Pet. 308. It is important, then, that there should be an existing assignee, having the property in his hands for distribution; indeed, it is essential, that there should be. In the case of *Brent* v. *Bank of Washington*, the plaintiff's testator had executed an assignment to certain persons, of all his estate, for the payment of the claims of the government, and his other creditors, so far forth as the estate would answer. The assignees refused to accept the assignment, or to act under it; and for this reason, the attorney-general admitted, and this court decided, the deed to be inoperative. 10 Pet. 597, 610–11. The refusal of the trustees to act, therefore, apart from the irregularity of their appointment, would, of itself, defeat any claim of priority on the part of the United States in this case. But it is evident, from a perusal of the act of 1829, that it was never intended or understood by the legislature, or the Elkton Bank, as a voluntary assignment of property for the benefit of creditors, in the meaning of the acts of congress. It was merely a proceeding preparatory to the final adjustment of the affairs of the

Elkton Bank, on the expiration of its charter, in a few years thereafter. The trustees were to have the privilege *of suing, and to be liable to be sued, in the same manner as the president and directors. They [*123 were to be elected in the same manner in which they had been elected, and in their place and stead. It was nothing more than the substitution of two men for twelve, in the administration of the bank—of trustees for directors. The act does not contemplate the immediate adjustment of the concerns of the institution; nor does it, in terms, restrict the trustees from carrying on the usual operations of the bank; but on the contrary, it expressly directs that they shall be elected in the place and stead of the president and directors; and as if their duties were not intended to expire but with the charter itself, it requires them, at every annual meeting thereafter, to exhibit to the stockholders a just and true statement of all their doings as such trustees. It made them responsible to the stockholders directly, as the president and directors were, and not to the creditors; and is predicated of no insolvency, actual or technical. And that the passage of this act, and the subsequent irregular proceedings under it, wrought no real change in the situation of the effects of the Elkton Bank, is manifest, from the view afterwards taken of the subject by the government itself; when it attached the same debt due from Beaston, in his hands, as garnishee of the president and directors of the Elkton Bank; thereby clearly showing that it never regarded the property of the Elkton Bank, or this debt, at least, as having ever passed by any assignment, actual or constructive, out of the possession of that institution, for the benefit of creditors, within the meaning of the acts of congress.

That this construction of the act of 1829, and this conjecture of its scope and object are correct, is further confirmed by the fact, that the power and authority of the legislature were invoked. The consent of that body was absolutely necessary, to vest the administration of the affairs of the bank in two instead of twelve persons, as the charter expressly confided its management to the latter number of persons; whereas, it will not be denied, that, if the object had been merely to make an assignment of property for the benefit of creditors, in the meaning of the acts of congress, the corporation had this power in its own hands, without the sanction or intervention of the legislature; and could have effected its purposes at once, by a deed assigning and conveying all its property to assignees or trustees. *State of Maryland* v. *Bank of Maryland*, 6 Gill & Johns. 220. There is nothing in the charter of the Elkton Bank to restrain it from so doing. If this power be denied to a corporation, then a corporation *can never be brought within the operation of the statutes giving priority. It [*124 is not within either one of the enumerated classes of cases. It cannot be a deceased debtor, with an insufficiency of assets in the hands of executors or administrators. Its effects cannot be attached as those of an absent, concealed or absconding debtor; for such a state of things cannot be possibly predicated of a corporation. It cannot be a technical insolvent, under the state laws; and if it cannot transfer its property to trustees, for the payment of its debts, without the intervention and permission of another, it cannot make a voluntary assignment. Indeed, it may be greatly doubted, from the phraseology of the act of 1797, whether it was ever intended to apply to corporations. Before this branch of the argument is concluded, it

must be observed, that up to this point, this case is considered as analogous to the case of *Prince* v. *Bartlett*, 8 Cranch 431. There, the effects of an insolvent debtor, duly attached by an individual creditor, in June, were considered not to he liable to the claim of the United States on a custom-house bond, given prior to the attachment, and put in suit in August following. And to the facts and principles of law, in *Prince* v. *Bartlett*, the particular attention of this court is asked.

But it is contended, that the appointment of receivers by the circuit court wrought some change in the condition, either of the parties in this suit, or of the debt due from Beaston ; so as to defeat the attachment of the Farmers' Bank, subsequently issued. It cannot be regarded as an assignment under the statutes, for, at least, it was not voluntary. The appointment of receivers is a discretionary power, sometimes exercised by a court of chancery as a measure of security against waste, mismanagement, &c., and is provisional only, for the more speedy getting in of a party's estate, and securing it for the benefit of such person as appears entitled ; and does not affect the right. 2 Madd. Ch. Pract. 187–8. It transfers no title. It does not even alter the possession of the estate in the person who shall be found entitled at the time the receiver was appointed ; so as to prevent the statute of limitations running on during the right in dispute. Ibid. 188. The appointment of receivers, therefore, in this case, did not affect the right of the parties to this or any other suit, or change the condition of the debt ; unless it had the effect to place it under the immediate control of the circuit court, as a court of equity, and thus protect it from all process of execution or attachment. It is said, in support of this position, that money, held by
*125] a person as *assignee of a bankrupt, or trustee of an insolvent, cannot be attached for a debt due by the bankrupt or insolvent, at the suit of any particular creditor. Sergeant on Attach. 83. But the reason is obvious. An assignment, in law or in fact, divests the bankrupt or insolvent of the property, and transfers it to the assignee, in trust for the creditors in general ; so that the bankrupt has no interest to attach. And besides, to permit an attachment in favor of a particular creditor to lie, would be subversive of the whole policy of the bankrupt and insolvent laws ; under which the assignment is intended to operate for the benefit of all creditors. And so with regard to property or money taken by a sheriff in execution, or money paid into court, it is considered as already in the custody of the law. But the appointment of receivers is, *per se*, no transfer or assignment of the property into their hands ; nor does it bring the property, until taken into the actual possession of the receivers, under the protection of the court, so that the court can punish for any interference with it, by attachment or otherwise. Indeed, this position is admitted and assumed by the United States ; and it may be added, by the judges of the circuit court themselves, in the proceedings which were had in that court to recover the judgment in favor of the United States against the Elkton Bank. The debt from Beaston was not regarded in those proceedings as actually or constructively in the possession, or under the control, of the receivers, or under the immediate protection of the court ; else why was an attachment, similar in all its features to the attachment of the Farmers' Bank, issued in the same manner, for the same debt, and against the same person ? Why was not that process, or some other, directed against the receivers, if the appoint-

ment of them operated as a transfer or assignment of this debt? Why, too, if after the appointment of them, any intermeddling by the Farmers' Bank, with the property or credits of the Elkton Bank, was a contempt of the circuit court, did the judges of that same court, sitting as a court of law, authorize (without requiring leave to be asked) similar proceedings in favor of the United States?

Besides, it is not understood how Beaston can avail himself of any act of contempt, on the part of the Farmers' Bank, towards the circuit court, as a defence to an action at law against him; when no interference on the part of that court has been attempted or sought. Until the case of *Angel* v. *Smith* settled the question, it seems to have been a matter of doubt, whether an ejectment might not be brought, without leave of court, *for lands [*126
even in the actual possession of a receiver, under the appointment of the court. 9 Ves. 335. There the court determined the question in the negative, by regarding the case of receivers as analogous to that of sequestrators; stating that it was clearly a contempt of court to disturb sequestrators in possession. Now, if the analogy between sequestrators and receivers be so striking as to compel the court to determine the law in one respect as to the one, by ascertaining how it stood in relation to the other, there can be no reason for supposing that it would not apply the same principles of law to both, in every case where the analogy could be traced. In the same case of *Angel* v. *Smith*, the chancellor said, that the court of king's bench had decided, that where a sequestration is awarded to collect money, to pay a demand in equity, if it is not executed; that is, if the sequestrators do not take possession; and a judgment-creditor takes out execution, notwithstanding the sequestration awarded, there may be a levy under the execution; and hence I think that it may with reason be inferred, that if a receiver does not take possession, and an execution or attachment issues at the suit of a creditor, there may be a levy. Here, it is admitted, that up to the time of the decision of the supreme court, which was long subsequent to the date of the attachment in favor of the Farmers' Bank, the receivers never had collected or received, or by any process of law, attempted to collect or receive, the debt due from Beaston. This decision in the case of *Angel* v. *Smith*, and the reasoning of the court, is deemed conclusive on this point of the case.

But in the last place, it is urged, that the judgment of condemnation against Beaston, in favor of the United States (which was rendered a long time after the date and service of the attachment in favor of the Farmer's Bank), and the subsequent payment thereof by Beaston, should operate as a bar to the recovery of the Farmers' Bank in this case. To the suit or proceedings on which this judgment of condemnation was rendered, the Farmers' Bank was not a party or privy. It is unnecessary to multiply authorities, to show that no one is bound by a judgment, unless he be a party to the suit, or in privity with the party. 1 Wheat. 6; 7 Cranch 271. If the other points in this cause cannot avail Beaston, as matters of defence, the rendition of the judgment of condemnation cannot; as it will then be evident, that if he had resorted to this court, as an appellate court, to review the decision of the circuit court, or had afforded the Farmers' *Bank (by giving notice of the attachment of the United States) an [*127
opportunity of vindicating its rights, by so doing he would have escaped

the consequences of that judgment; as the facts involved in that case are the same which exist in this. In the concluding language of the opinion of the court of appeals of Maryland, "it is undoubtedly a hardship on the defendant (Beaston) to be compelled twice to pay the same debt. But it must be recollected, that the plaintiff (the Farmers' Bank) had a prior attachment, which operates as a lien; and it would be a still greater hardship, that such plaintiff should lose his lien, thus legally acquired, by the judgment of a court, in a cause to which he was no party, and of which we have no evidence that he had, in any manner, any notice. If the defendant failed to take the proper steps, in the predicament in which he was placed, to defend and protect his interests; it is but fair, that he should suffer the consequences. Had notice been given of this attachment by the United States, the plaintiff might have vindicated his rights, and had an opportunity of asserting his anterior lien; and of obtaining the decision of the appellate court, had it become necessary. Nor is it perceived, why it would not have been competent for the defendant, in this conflict of claims against him, to have brought the conflicting parties into chancery; where the rights and priority of each might have been adjudicated, without prejudice to him. But, least of all, would the defendant be entitled to avail himself of the judgment of the United States, recovered against him; since, from the examination of the record of that suit, it appears that his defence was taken solely on the plea of *nulla bona;* a defence which could certainly have been of no avail, when it appeared, by the answers filed to the interrogatories of the United States, that he was indebted to the Elkton Bank of Maryland; and although in the answers he adverts to the attachment issued against him by the Farmers' Bank of Delaware, he has not pleaded such attachment as pending against him, whereby he could obtain the opinion of the court in relation to its priority. In every aspect, therefore, in which we can view the decision below (Cecil county court) we are brought to the conclusion, that it cannot be sustained." In conclusion, it is added, that it appears clearly, that this opinion of the court of appeals of Maryland, must be sustained by this court throughout.

Butler, Attorney-General, in reply:—Most of the views presented by
*128] the learned counsel for the defendant *in error, have been sufficiently met in the oral arguments at the bar; to which, and especially to the argument of the associate counsel, the court are respectfully referred. In addition to the reasoning and authorities then submitted, the following remarks are offered:

1. It is conceded, that no lien on the property of the debtor is created by the statutes, until the priority given by them actually attaches. If, therefore, before the right of priority accrues, the debtor makes a *bonâ fide* conveyance of his estate to a third person, or mortgages it to secure a debt; or if his property be seized under an execution, or be attached, in cases where such a remedy is given; the United States, though the facts necessary to entitle them to a preference should afterwards occur, will have no claim on the property so sold, mortgaged, levied on, or attached. Even when the priority of the United States has actually attached, there is, strictly speaking, no lien on the property in the hands of the executors or administrators, assignees or trustees, as the case may be; but only a claim

on the fund in their hands, and various remedies against them for its faithful application. That is to say, the executors, &c., may sell the property and transfer a valid title, and the purchaser will hold it free from any lien in favor of the United States; who cannot specifically reclaim the property from the purchaser, but must look to the executor, &c. But the right of the United States to be first paid, when the facts have occurred which give them a priority, is a right which will be protected; even before the debtor's property has been converted into money, by his executors, &c., in the same way, and to the same extent, as the right of any other *cestui qui trust.* Thus, if the executors, &c., be insolvent, and be about to waste the property or misapply its proceeds, receivers may be appointed, at the instance of the United States; and they will be entitled to such other preventive remedies, as may be necessary to render their priority effectual. After the priority has attached, the debtor's property is incapable of being levied on or attached by any other creditor, in any such way as to defeat that priority. If this be not so, the statutes giving the preference will be useless; and that it is so, is necessarily implied, in every case on the subject decided by the courts. The foregoing observations, it is believed, dispose of the introductory remarks of the defendant's argument.

*2. The opposing argument denies, that the United States ever had any right to priority of payment against the Elkton Bank. It is [*129 contended, on the part of the United States, that before the issuing of the attachment in favor of the Farmers' Bank (Sept. 24th, 1830), the United States had acquired, as against the Elkton Bank, a right to priority of payment out of its effects; not by the execution of a voluntary assignment of all its property, but by its insolvency, and its commission of an act of legal bankruptcy, within the meaning of the statutes in question. The whole argument, under the fourth proposition, that there was here no voluntary assignment by the Elkton Bank, for the benefit of its creditors, may, therefore, be laid out of the case. Our positions are, that the Elkton Bank was capable of becoming insolvent, and committing acts of legal bankruptcy, within the true intent and meaning of the acts of congress; and that it did so as early as December 1829, when it applied to the legislature of Maryland for a special law to wind up its affairs; especially, as this application had been preceded by a non-user of the chief franchises of the corporation, from March 1829, and the recovery of a judgment against them, in favor of the United States. This is not the case of mere inability to pay; it is a case of utter, acknowledged and notorious insolvency; and these acts are acts of legal bankruptcy. In this view, it is of no moment whatever, that the trustees, under the special law, were not duly appointed, or did not accept; though, if the priority had been claimed here, as in *Brent* v. *Bank of Washington,* 10 Pet. 597, on the ground of a voluntary assignment, those points would have been material.

If the Elkton Bank did not become insolvent, and commit acts of legal bankruptcy, in December 1829; yet, when, to the circumstances which had then occurred, we add the appointment of receivers, in April 1830, by the circuit court, and the proceedings of the stockholders, in May 1830; surely we have an accumulation of notorious and decisive facts, exhibiting, in the fullest manner, and in pursuance of law, the utter insolvency of the corporation. When the insolvency, or acts of bankruptcy, required by the statutes,

have actually occurred, the priority *eo instanti* attaches; although some time may elapse before a trustee be formally appointed. Every person indebted to the insolvent, or in possession of his property, becomes, as to such debt or property, the trustee of the United States, from the moment he has notice of their priority. Should he *actually pay over the *130] debt, or deliver the property to another creditor, pursuant to the judgment of a state court, before he has notice of the claim of the United States, this would undoubtedly protect him. But nothing of this sort occurred in the present case. Beaston, before the judgment recovered against him by the defendant in error, had received, through the summons of the United States, under the act of 1818, which was served on him, on the 19th of October 1831, legal notice of the claim of the United States; and though he pleaded the pendency of the attachment in favor of the defendant in error, this plea was justly regarded as unavailing. Now, it will appear by the record, that, although Beaston was served with that attachment, in September 1830, he was not required to plead to it until April term 1834; when a case stated was agreed on by the parties, containing, among other things, all the proceedings in favor of the United States, together with the fact that the debt had been paid to them, agreeable to the judgment of condemnation.

The circumstances here stated, entirely distinguish this case from *Prince* v. *Barlett*, 8 Cranch 431, so much relied on by the other side. There, the property of the debtor was attached by his private creditors, on the 4th of June 1810. He was then bound to the United States, in certain duty bonds, which, however, were not then payable; nor did they become payable until August, in which month they were put in suit. Executions in favor of the United States were issued on the 18th of September following, when it appeared, that the debtor was insolvent; but no legal act of bankruptcy had been committed, even then. In this state of things, and especially as the debt to the United States did not become due and payable until after the service of the attachment; it was very properly decided, that the United States were not entitled to the priority claimed by them. But the opinion of the court (p. 433–4) very clearly shows, that had the debt been due to the United States, and had a legal act of bankruptcy been committed (as is contended is the case here), before the service of the attachment, the priority would have attached, and would not have been defeated by the service of the attachment.

3. In answer to the remarks relative to the effect of the appointment of receivers, and on the judgment of condemnation, the learned argument of the counsel who opened the cause, on his second and third points, is referred to.

*131] *McKinley, Justice, delivered the opinion of the court.—This is a writ of error to the judgment of the court of appeals for the eastern shore of Maryland, reversing the judgment of the Cecil county court. The defendant in error sued out and prosecuted a writ of attachment *fieri facias* against the plaintiff in error, in said county court, upon a judgment previously obtained against the Elkton Bank of Maryland; upon which the sheriff returned that he had attached goods and chattels, rights and credits of the president and directors of said Elkton Bank, in the hands of the plain-

tiff in error, the sum of $500. Upon the trial of the cause, the following agreed case was submitted by the parties to the court for its judgment:

"It is agreed in this case, that in 1828, the United States instituted a suit against the Elkton Bank, in the circuit court of the United States, at the December term 1829, a verdict and judgment were rendered in said suit, in favor of the United States, for $21,200; on which judgment a *fieri facias* was issued at April term 1830, and returned *nulla bona;* but it is admitted, that at the time, the said president and directors of the Elkton Bank had a large landed estate, which has been since sold, and applied to satisfy in part the said judgment; which landed estate, together with all other effects or property belonging to the bank, would not enable the bank to pay its debts, and that the same property and effects are not sufficient to pay the said debt due to the United States; and it is admitted, that the bank was then unable to pay its debts. An appeal was prosecuted, but no appeal bond given; and the judgment was affirmed in the supreme court, at the January term 1832. At the April term 1830, of the circuit court, a bill in equity was filed against the said bank, at the suit of the United States; and Nathaniel Williams and John Glenn were appointed, by an order of court, receivers, with authority to take possession of the property of said bank, to dispose of the same, and to collect all debts due to it, as appears by the record marked exhibit A; which receivers gave bond, on the 14th day of June 1830, and proceeded to excute their trust. The records marked exhibit A and exhibit B, herewith filed, are to be considered as part of this case stated. At December session 1829, application was made to the legislature of Maryland, by the several persons who were the acting president and directors of the said bank, for the act which was passed at that session, ch. 170; which, with all other acts *relating to said bank, are to be considered as part of this statement. A meeting of the stockholders convened on the 17th day [*132 of May 1830, which was the third Monday of said month, but without the notice mentioned and required by the act incorporating the bank, and its supplements; and at the said meeting, a majority of the stockholders appointed two trustees, in conformity with the provisions of said act, who declined accepting; and no trustees have ever since been appointed, nor has there since been an annual or other meeting of the stockholders, or an election of directors; nor have there been any banking operations carried on by any persons professing to be the corporation of the Elkton Bank, since March 1829.

"At September term 1828, the Elkton Bank obtained a judgment against George Beaston for the sum which is attached in this suit; which, at the time of issuing and service of this attachment, had not been paid by Beaston. At April term 1830, the Farmers' Bank of Delaware obtained, in Cecil county court, a judgment against the president and directors of the Elkton Bank for $5000, with interest from 9th December 1825, till paid, and costs; and before the appointment and bonding of the receivers, as aforesaid, and on the 24th September 1830, upon that judgment, issued this attachment, and attached in the hands of said Beaston, the sum of $500; and after this attachment was issued and served, and after the affirmation of the judgment of the circuit court by the supreme court, attachment was issued by the United States, and the other proceedings had, as appears from the record marked B; and Beaston has actually paid and satisfied to the United States

the amount for which judgment of condemnation was rendered against him in the circuit court. It is admitted, that up to the time of the decision in the supreme court, the said receivers had never collected or received, or by any process of law attempted to collect or receive, the said debt, attached in this case. The question for the opinion of the court is, whether the plaintiff can sustain the present attachment?" Whereupon, the court rendered judgment in favor of the defendant; and upon an appeal taken by the plaintiff, the court of appeals reversed the judgment of the county court.

In the argument here, the counsel for the plaintiff in error made the following points: 1st, The Elkton Bank of Maryland is a person, within the meaning of the act of congress of the 3d of March 1797, giving priority of payment to the United States: 2d, By a proper construction of that act, *133] the plaintiff in error, having paid to the *United States the amount which he owned to the Elkton Bank, is not liable to the defendant in error: 3d, The appointment of receivers by the circuit court, with power to take possession of the property of the bank, and to sell and dispose of the same, and to collect all debts due to it, was such an assignment of its property as to give the right of priority to the United States: 4th, The election of trustees, by the stockholders of the bank, under the act of the Maryland legislature, was also such an assignment of the property of the bank as to give the right of priority to the United States: and for these reasons, they contended, the judgment of the court of appeals ought to be reversed.

The counsel for the defendant in error resisted all the grounds assumed by the counsel for the plaintiff in error; and insisted, that by a fair construction of the fifth section of the act, and the former adjudications of this court, the priority therein provided for, did not attach to the fund belonging to the Elkton Bank, in the hands of the plaintiff in error. The section referred to is in these words:

"That when any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased person, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

From the language employed in this section, and the construction given to it, from time to time, by this court, these rules are clearly established: 1st, That no lien was created by the statute: 2d, The priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: 3d, No evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and 4th, Whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and *134] is bound to pay their debt first out of the proceeds of the debtor's *property. *United States* v. *Fisher*, 2 Cranch 358; *United States* v.

Hooe, 3 Ibid. 73; *Prince* v. *Bartlett*, 8 Ibid. 431; *Conard* v. *Atlantic Insurance Company*, 1 Pet. 439; *Conard* v. *Nicoll*, 4 Ibid. 308; *Brent* v. *Bank of Washington*, 10 Ibid. 596.

If the Elkton Bank of Maryland is not a person, within the meaning of the act, no law of congress was drawn in question in the court below; and consequently, the question of priority did not arise. That court having decided upon the legal effect of the several acts done by the circuit court of the United States; and also upon the legal effect of the election of trustees by the stockholders of the bank, under the act of Maryland; which several acts were relied upon, by the plaintiff in error, as being an assignment of all the property of the bank, or as constituting an act equivalent to such an assignment; the question, whether the bank is a person, within the meaning of the act of congress, was necessarily decided. It lies at the foundation of the whole proceeding; and if we now decide, that the bank is not a person, within the meaning of the act, under the 25th section of the judiciary act of 1789, it will be our duty to dismiss the writ of error for want of jurisdiction. *Inglee* v. *Coolidge*, 2 Wheat. 363; *Miller* v. *Nicholls*, 4 Wheat. 311; *Crowell* v. *Randell*, and *Shoemaker* v. *Randell*, 10 Pet. 368; *McKinney* v. *Carroll*, decided at the present term of this court. We must, therefore, inquire, whether the bank is a *person*, within the meaning of the act of congress.

All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the act of congress. And it is manifest, that congress intended to give priority of payment to the United States over all other creditors, in the cases stated therein. It, therefore, lies upon those who claim exemption from the operation of the statute, to show that they are not within its provisions. No authority has been adduced, to show, that a corporation may not, in the construction of statutes, be regarded as a natural person; while, on the contrary, authorities have been cited, which show, that corporations are to be deemed and considered as *persons*, when the circumstances in which they are placed, are identical with those of natural persons, expressly included in such statutes. As this statute has reference to the public good, it ought to be liberally construed. *United States* v. *State Bank of North Carolina*, 6 Pet. 29. As this question has been fully decided by this court, other authorities need not be cited.

*In the case of the *United States* v. *Amedy*, 11 Wheat. 392, which was a prosecution for destroying a vessel at sea, with intent to *]135
prejudice the underwriters, the Boston Insurance Company, the section of the statute under which he was prosecuted, subjected to the penalty of death, any person, being owner, or part-owner, who should burn, destroy, &c., any ship or vessel, with intent to prejudice any person or persons, that had underwritten, or should underwrite, any policy of insurance, &c. The court, in delivering the opinion, says: "Another question, not raised in the court below, has been raised here, and upon which, as it is vital to the prosecution, we feel ourselves called upon to express an opinion. It is, that a corporation is not a person, within the meaning of the act of congress. If there had been any settled course of decisions on this subject, in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of the act. But there is no such course of decision. The mischief,

intended to be reached by the statute, is the same whether it respects private or corporate persons." After citing 2 Inst. 736, and some other authorities, the opinion proceeds thus: "Finding, therefore, no authority at common law which overthrows the doctrime of Lord COKE, we do no think that we are entitled to engraft any such constructive exception upon the text of the statute." This case, we think, is decisive of the question. And the fact, that the Elkton Bank cannot be brought within all the predicaments stated in the statute, proves nothing; if it can be brought within any one or more of them. The record in this case abundantly proves, that a bank may become largely indebted to the United States, and not have property sufficient to pay all its debts. If to these facts were superadded the fact of a voluntary assignment by the bank, of all its property, in any mode authorized by law; the right of the United States to priority would be clearly established.

This brings us to the consideration of the second point raised by the plaintiff in error. The agreed case shows that the attachment *fieri facias*, upon the judgment of the defendant in error, against the Elkton Bank, issued on the 24th day of September 1830; and attached in the hands of the plaintiff in error, the sum in controversy. The attachment in favor of the United States did not issue until the 8th day of July 1831. And the plaintiff in error, in answering the interrogatories propounded to him in that proceeding, stated, that in October, in the year 1830, an attachment, at the
*136] suit of the Farmers' *Bank of Delaware, against him, as garnishee of the Elkton Bank of Maryland, was served on him, returnable to Cecil county court, where said attachment was still depending. The money thus attached in the hands of the plaintiff in error, by legal process, before the issuing of the attachment in behalf of the United States, was bound for the debt for which it was legally attached, by a writ, which is in the nature of an execution; and the right of a private creditor, thus acquired, could not be defeated by the process subsequently issued on the part of the United States. *Prince* v. *Bartlett*, 8 Cranch 431.

We are next to inquire into the legal effect of the appointment of receivers by the circuit court. Without deciding whether a circuit court of the United States has authority, in a case like this, to appoint receivers, with power to take possession of all the property of a debtor of the United States; it is sufficient to say, in this case, that it does not appear that the power conferred on the receivers was ever executed; and if it had been, it would not have been a transfer and possession of the property of the Elkton Bank, within the meaning of the act of congress; and therefore, the priority could not have attached to the funds in their hands.

The only remaining question is, whether the election of trustees, by the stockholders of the Elkton Bank, under the statute of Maryland, was such an assignment of all the property of the bank, as would entitle the United States to priority of payment out of its funds. In the investigation of this branch of the subject, it is not necessary to inquire into the regularity of the election of the trustees. Suppose it to have been perfectly regular, in all respects, did it so operate as to divest the Elkton Bank of its property? No one can be divested of his property, by any mode of conveyance, statutory or otherwise, unless at the same time, and by the same conveyance, the grantee becomes invested with the title. As the trustees refused to

accept the trust, none was created; and the election thereby become inoperative and void, and the property remained in the bank. *Brent* v. *Bank of Washington*, 10 Pet. 611; *Hunter* v. *United States*, 5 Ibid. 173. The moment the transfer of property takes place, under the statute, the person taking it, whether by voluntary assignment or by operation of law, becomes bound to the United States for the faithful performance of the trust. *Conard* v. *Atlantic Insurance Company*, 1 Pet. 439. As the title to the property of the bank did not pass to the trustees, by virtue of the election, there was no fund *to which the priority of the United States could attach; there was no one authorized or bound to execute a trust under the statute; therefore, no legal bar was opposed to the right of recovery and satisfaction of the debt due by the Elkton Bank to the defendant in error. [*137

Upon the whole, it is the opinion of the court, there is no error in the judgment of the court of appeals.

STORY, Justice. (*Dissenting.*)—I dissent from so much of the opinion delivered by the court in this case, as decides that a corporation is a person, within the sense of the 5th section of the act of 1797, ch. 74. I have no doubt whatsoever, that in a legal and technical sense, a corporation is a person; and that under that denomination, it may be included within the provisions of a statute, where the language and provisions and objects of the statute equally apply to corporations and to private persons. My dissent is founded upon this ground, that neither the language nor the provisions of the 5th section of the act of 1797, ch. 74, are applicable to the case of corporations: but that they apply exclusively to private persons; and cannot, without violence to the words and the objects of that act, be strained so as to reach corporations. I think, that the persons intended by the act, are such persons only as may be brought within each of the predicaments stated in the act.

The language of the 5th section is, "that where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased person, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed.

Now, the statute, manifestly, in this provision, contemplates two classes of cases; insolvency *inter vivos;* and insolvency upon the death of a debtor. It is plain, that the last class cannot have been intended to include corporations; for if it were to be supposed, that they could be "deceased debtors," yet by no reasonable use of language, can it be said, that they can have executors or administrators, *or estate in the hands of executors or administrators. The other class of cases is of insolvency *inter vivos.* [*138 What are these? First, cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof;

that is, of all his property. It certainly is practicable for a corporation to be in this predicament, if, by its charter and constitution, it is capable of making such a general assignment. But I must say, that independent of some special and positive law or provision in its charter to such an effect, I do exceedingly doubt, if any corporation, at least, without the express assent of all the corporators, can rightfully dispose of all its property, by such a general assignment, so as to render itself incapable in future of performing any of its corporate functions. That would be to say, that a majority of a corporation had a right to extinguish the corporation, by its own will, and at its own pleasure. I doubt that right; at least, unless under very special circumstances. Secondly, cases of an absconding, concealed or absent debtor. Now, it is plain, that in no just sense can a corporation be brought within the terms of this predicament. Thirdly, cases of legal bankruptcy. Such cases do not exist in relation to corporations. The general bankrupt laws of England have never been held to extend to corporations; neither have the general insolvent laws of the several states in this Union, where they exist, ever been extended to corporations. Now, my argument is this, and I wish to put it into the most precise and concise form; that the fifth section of the act of 1797, ch. 74, was never intended to apply to any debtors or persons, who were not, and might not be within every one of the classes of predicaments above stated. Corporations cannot be within three out of the four predicaments above stated; and therefore, I hold, that the legislature never could have intended to embrace them within the provisions of the section.

I dissent from the opinion upon this point, upon another and independent ground; and that is, that the opinion is wholly extra-judicial, and unauthorized by law. That the question was not made or decided in the court below; and that unless it was so made and decided, it cannot be re-examined in this court. This is a writ of error, not to a circuit court of the United States, but to the highest court of a state; and brought here for our revision, under the 25th section of the judiciary act of 1789, ch. 20. The section expressly declares, that upon such a writ of error "no other error shall be assigned, or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately
*139] *respects the before-mentioned questions of the validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute." The preceding part of the same question authorizes the writ of error, only when the decision of the state court has been against the validity or construction of the constitution, treaties, statutes, commissions or authorities stated in the section. So that it is manifest, and so has been the uniform course of this court, that no question, not made in the court below, on which its judgment ultimately turned, can be made, or is re-examinable, here. I have already said, that it is apparent upon this record, that no such point arose, or decision was made, in the court of appeals of Maryland; and therefore, I cannot but consider the decision here pronounced upon it, as *coram non judice;* and in no just sense, obligatory upon us, or upon our successors.

I know that my brother, Mr. Justice BARBOUR, held the same opinion as I do, on this question. His departure from the court, before the opinion

in this case was pronounced, does not entitle me to speak further in his behalf.

BALDWIN, Justice, concurred with Mr. Justice STORY in the opinion delivered by him; and with the majority of the court, in affirming the judgment of the court of appeals.

MCLEAN, Justice, concurred with Mr. Justice STORY.

THIS cause came on to be heard, on the transcript of the record from the court of appeals for the eastern shore of Maryland, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said court of appeals in this cause be and the same is hereby affirmed, with costs.

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*The Heirs of NICHOLAS WILSON *v.* The LIFE AND FIRE INSURANCE COMPANY OF NEW YORK. [*140

Practice.

In certain proceedings for the sale of property mortgaged, the widow and children of the deceased owner of the property were made defendants; the district court of Louisiana gave a judgment in favor of the plaintiffs; the widow was entitled to her community in the property mortgaged, and had taken the property at the appraisement and estimation. The writ of error to the district court of Louisiana was issued in the name of "the heirs of Nicholas Wilson," without naming any person as plaintiff; the widow of Nicholas Wilson did not join in the writ of error. The writ of error was dismissed on the two grounds: that no person was named in it; and that the widow of Nicholas Wilson had not joined in it.

The rule of court is, that where there is a substantial defect in the appeal or writ of error, the objection may be taken at any time before the judgment; on the ground, that the case is not legally before the court, and that it has not jurisdiction to try it. Deneale *v.* Stump's Executors, 8 Pet. 526; and Owings *v.* Kincannon, 7 Ibid. 399, cited.

ERROR to the District Court for the Eastern District of Louisiana.

Butler, for the defendants, moved to dismiss the writ of error. 1. Because no persons are named in the writ as plaintiffs; but they are described, generally, as the Heirs of Nicholas Wilson. 2. That the widow of Nicholas Wilson, who is interested in the suit, did not join in the application for the writ of error.

The motion was opposed by *Coxe* and *Webster*.

TANEY, Ch. J., delivered the opinion of the court.—The proceedings in this case were instituted in the district court for the eastern district of Louisiana, for the purpose of procuring the sale of certain property mortgaged by Nicholas Wilson, in his lifetime, to the Life and Fire Insurance Company of New York. The widow and children of the deceased were made defendants in the petition, and the judgment in the district court was in favor of the plaintiffs. The widow, it appears, was entitled to her community *in the property mortgaged; and had taken the property of [*141
the deceased, as she had a right to do, at the appraisement and estimation.

The counsel for the defendant in error has moved to dismiss this case: 1st, Because no persons are named as plaintiffs in the writ of error; but

they are described generally in the writ as "the Heirs of Nicholas Wilson." 2d, If this general description is sufficient, yet it appears by the petition for the writ, which is referred to in the appeal bond, that the widow did not join in the application for the writ of error: and as the judgment against the defendants was a joint one, they must all join in a writ of error, unless there is a summons and severance. We think the writ of error must be dismissed on both grounds; and that the points raised have already been decided by this court.

In the case in 8 Pet. 526, the writ of error issued in the name of "Mary Deneale, executrix of George Deneale, and others." It was dismissed on the motion of the defendants in error, and the court said, "the present writ of error is brought by Mary Deneale *and others* as plaintiffs; but who the *others* are cannot be known to the court, for their names are not given in the writ of error, as they ought to be. Mary Deneale cannot alone maintain a writ of error on this judgment; but all the parties must be joined and their names set forth, in order that the court may proceed to give a proper judgment in the case." In the case now before the court, the name of no one of the parties is set forth in the writ of error; and according to the rule laid down in the case referred to, this writ of error cannot be maintained.

The second objection above stated, falls within the principle decided in *Owings* v. *Kincannon*, 7 Pet. 399. In that case, a joint decree was passed by the circuit court for the district of Kentucky, against six defendants. An appeal was prayed, generally, from the decree; but in the appeal bond, it was stated, that two had prayed an appeal, and nothing was there said of the others. The court considered the statement in the bond as explaining the general entry granting the appeal; and dismissed the case, because all of the defendants in the court below had not joined in it. In the case before the court, if the omission to name the plaintiffs in error in the writ was not regarded as an insuperable objection, and if the general description of "the Heirs of Nicholas Wilson," could be supposed, under the laws of Louisiana, to include his widow; yet the statement in the petition for the writ of error
*142] which is referred *to in the bond, would explain the general description in the writ. and bring this case within the principle decided in *Owings* v. *Kincannon*.

In both of the cases referred to, it appears, that the motions to dismiss were not made at the first term, or at the time of appearance in this court; but each of the cases had been depending here two years, before the motion was made. The rule of this court, therefore, is, that where there is a substantial defect in the appeal or writ of error, the objection may be taken, at any time before judgment, on the ground that the case is not legally before us; and that we have not jurisdiction to try it. It follows, that the writ of error in the case under consideration must be dismissed.

Baldwin, Justice, dissented.

On considertion of the motion made in this cause by Mr. Butler, to dismiss this case for irregularity, on the ground, that the writ of error does not set forth the names of all the parties, and of the arguments of counsel thereupon had, as well in support of, as against the motion: It is now here ordered and adjudged by this court, that this writ of error to the district

court of the United States for the eastern district of Louisiana be and the same is hereby dismissed, and that it be so certified to the said district court.

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*Edward Sarchet and others, Appellants, v. United States. [*143

Appellate jurisdiction.

The United States instituted a suit, on a bond for duties, in the district court of the southern district of New York; and after a trial and verdict for the United States, judgment was given against the defendant; who thereupon prosecuted a writ of error to the circuit court, for the southern district of New York, where the judgment of the district court was affirmed; the defendant then appealed to the supreme court: *Held*, that cases at law can only be brought from the circuit court by writ of error, and cannot be brought by appeal. In cases at law, removed from the district to the circuit court, the judgment of the circuit court is final and conclusive; it is otherwise, in cases of admiralty and maritime jurisdiction. United States *v.* Hudson, 7 Cranch 108; and the several cases, 7 Ibid. 287; and 2 Wheat. 248, 395, cited.

Appeal from the Circuit Court for the Southern District of New York.

Butler, Attorney-General, moved to dismiss the appeal, on two grounds 1. That this was originally a proceeding at law, on a bond for duties, in the district court of New York for the southern district; and was, after a judgment of that court for the United States, taken by a writ of error to the circuit court for the southern circuit, by the defendant: where the judgment of the district court was affirmed. The judgment of the circuit was final in such a case. 2. This is a proceeding at law; and the defendant has brought the case from the circuit court by an appeal, and not by a writ of error. Butler cited *United States* v. *Goodwin*, 7 Cranch 108; 7 Ibid. 287; 3 Wheat. 248, &c.

Sarchet, opposed the motion, in person: cited, 3 Dall. 171; 2 Wheat. 259.

Taney, Ch. J., delivered the opinion of the court.—In this case, an action was brought by the United States against Edward Sarchet and others, in the district court for the southern district of New York, upon a bond for duties charged by the collector upon certain iron imported into the United States. The duties *claimed were contested by the defendants, upon [*144 the ground, that iron of the description imported was not by law chargeable with that duty, and that the bond was, therefore, improperly taken. The judgment in the district court was against the defendants; and they removed it, by writ of error, to the circuit court for the southern district of New York, in the second circuit, where the judgment of the district court was affirmed; and the case is now brought here by appeal from the judgment of the circuit court. The attorney-general has moved to dismiss the case for want of jurisdiction in this court: and we think the *appeal* cannot be sustained.

It has been repeatedly determined that, under the acts of congress regulating the appellate jurisdiction of this court from the circuit courts, cases must be brought here by writ of error, and cannot be brought here by appeal. And as this was a suit at law on a bond, it could not, under any circum-

stances, legally come before us on appeal; but must come up by writ of error in order to give us jurisdiction to try it.

There is also another objection, equally fatal to this proceeding. In cases at law, removed from the district court to the circuit court, the judgment of the circuit court is final between the parties. It is otherwise in cases in equity, and of admiralty and maritime jurisdiction; and although the reason for this distinction may not be entirely obvious, yet it is our duty to conform to the provisions of the law: and this court have repeatedly decided, that, in civil cases at law, the judgment of the circuit court is final, where the case is removed by writ of error, from the district court to the circuit court. The point was fully considered and decided in the case of the *United States* v. *Goodwin*, 7 Cranch 108; and the opinion there given has been since re-affirmed in several cases. Ibid. 287; 2 Wheat. 248, 395. The question must be regarded as too well settled to be now open for argument; and as this court would not have jurisdiction, in any form of proceeding, to review the judgment in this case by the circuit court; it would be evidently improper to hear an argument on the question decided there, or to express any opinion concerning them. The appeal is, therefore, dismissed.

Appeal dismissed.

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*145] *Charles Scott, Bailiff of William S. Moore, Plaintiff in error, *v.* John Lloyd, Defendant in error.

Competency of witness.

Where the grantor of annuity by deed, has conveyed all his interest in the property charged therewith, and an allegation of usury in the granting thereof is afterwards made, he may be a witness to prove usury; if he is not a party to the suit, and has conveyed all his right and title to the property to others, his creditors, thus divesting himself of all interest arising out of the original agreement, and is released from his debts by them, and is not liable to the costs of the suit.[1]

The decision in Willings *v.* Consequa, Pet. C. C. 301; where the court held that a party named on the record might be released, so as to constitute him a competent witness, was cited in the argument. The court said, such a rule would hold out to parties a strong temptation to perjury; and we think it is not sustained either by principle or authority.

Error to the Circuit Court of the District of Columbia, and county of Washington. This case was before the court, at the January term 1830 (4 Pet. 205); and again at January term 1835 (9 Ibid. 418). It now came up on a writ of error, prosecuted by the plaintiff in the circuit court. The questions involved in the case when it was before the court in 1830 and 1835, and also in this case, are stated in the opinion of the court. The

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[1] It is now provided by statute, that in the courts of the United States, no witness shall be excluded, in any civil action, because he is a party to, or interested in, the issue to be tried: provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the courts. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and in admiralty. 1 R. S. § 858. See Texas *v.* Chiles, 21 Wall. 488

competency of Jonathan Scholfield, who was examined as a witness for the defendant, was the only question in this writ of error.

The cause was argued by *Jones* and *Coxe*, for the plaintiff in error; and by *Key* and *Swann*, for the defendant.

For the *plaintiff* in error, the following cases were cited. Stark. Evid. 93–4, 292; Phil. Evid. ch. 5, § 4, p. 74; 7 East 587; 1 Maule & Selw. 636; 10 East 395; 5 Barn. & Cres. 188.

For the *defendant*, were cited, *Willings* v. *Consequa*, Pet. C. C. 301; 1 Rand. 235; 6 Ves. 547; 1 T. R. 162; 7 Cranch 271; 1 Wheat. 160; Ibid. 60; 2 Stark. Evid. 136; 1 Munf. 398; 3 Call 372; 5 Wend. 415.

*McLean, Justice, delivered the opinion of the court.—This is the third time that this case has been brought before the court, by writ of error to the circuit court of the district of Columbia. The first decision is reported in 4 Pet. 205; and the second in 9 Ibid. 418. [*146

The controversy arose out of a certain deed executed by Jonathan Scholfield and wife to William S. Moore, all of the town of Alexandria, in the district of Columbia. For the consideration of $5000, Scholfield and wife conveyed to Moore, his heirs and assigns, for ever, one certain annuity or rent of $500, to be issuing out of, and charged upon a lot of ground and four brick tenements, &c. The annuity to be paid in half-yearly payments; and in default of such payment, from time to time, Moore, his heirs and assigns, had a right to enter, and levy by distress, &c. And should there not be sufficient property found on the premises, &c., the grantee had a right to expel the grantor, and occupy the premises. Scholfield, his heirs and assigns, were bound to keep the premises insured, and to assign to Moore the policies: and Moore, for himself, his heirs and assigns, did covenant with Scholfield, that after the expiration of five years, on the payment of the sum of $5000, and all arrears of rent, the rent-charge should be released. Scholfield and wife conveyed the above premises, the 29th October 1816, to John Lloyd. The annuity being unpaid, in 1825, Scott, as the bailiff of Moore, entered, and made distress, &c., and Lloyd replevied the property.

The principal question in this case, when it was before the court in 1830, arose on certain special pleas, which averred the contract to be usurious. And this court decided, that although the instrument was not usurious upon its face, yet that the second and fourth pleas contained averments, connected with the contract, which constituted usury; and the judgment of the circuit court was reversed, and the cause remanded for further proceedings.

The case was again brought up in 1835, on certain exceptions to the ruling of the circuit court; and among others, to the competency of Jonathan Scholfield, who was sworn, and examined as a witness. To show his interest, the following instruments of writing were read. *1. The original contract between nim and Moore, as above stated. 2. A letter from Scholfield to Lloyd, dated 9th of June 1824, which stated that the contract which created the rent-charge was usurious, and that measures would be taken to set it aside. And Moore was notified not to pay any part of the rent; and assured, if distress should be made, he should be saved harmless. 2. A deed, dated 18th November 1825, from Scholfield, [*147

making a conditional assignment of one-fifth of the annuity to Thomas K. Beale, in which he recites and acknowledges his responsibility to Lloyd. 4. An exemplification of a record, showing the discharge of Scholfield under the insolvent laws of Virginia.

To show the competency of Scholfield, the following documents were given in evidence: 1. A release from Scholfield to the plaintiff in replevin, dated 13th June 1831, whereby, for the consideration of $5000, he releases to Lloyd all the right, title and interest which he has or may have from the decision of the suit depending for the annuity or rent-charge; or which he has, or may have, in the property out of which it issues. He also releases Lloyd from all covenants or obligations, express or implied, arising out of the deed of assignment. 2. A release, dated 25th April 1828, from Scholfield to Lloyd, of all his right, &c., to the suit, &c., and to all sums of money which may accrue, and from all actions, &c. 3. A release, of the same date from Thomas K. Beale and James M. McCrea, to Scholfield, for $950, part of a debt of $2000, due from him to them. 4. A release, of the same date, from Joseph Smith, for $1150, part of a debt of $3000, due to him from Scholfield. 5. An obligation of Lloyd, dated 25th April 1828, binding himself to pay to the persons named, the several sums released, as above, to Scholfield, should he succeed in the above suit. 6. A release from Lloyd to Scholfield of $5000, debt, &c.

In giving the opinion of the court on the competency of Scholfield as a witness, the late chief justice says: "Some diversity of opinion prevailed on the question, whether he could be received to invalidate a paper executed by himself; but without deciding this question, a *majority of the
*148] court is of opinion, that he is interested in the event of the suit." His letter of the 9th of June, to Lloyd, the tenant in possession, requiring him to withhold from Moore the payment of any further sum of money, on account of this rent charge, contains this declaration: "and in case distress should be made upon you for the rent, I promise to save you harmless, if you will resist payment by writ of replevy. I wish you to understand, that if you make any further payments after receiving this notice, that you make them at your own risk." This, says the chief justice, is an explicit and absolute undertaking, to assume all the liabilities which Lloyd might incur by suing out a writ of replevin. Mr. Scholfield, then, is responsible to Lloyd for the costs of this suit. And the court held, that the various releases above stated, did not release Scholfield from his obligation to pay the costs, which had accrued in the suit, should the final decision be against Lloyd; and that he was, therefore, an interested and incompetent witness. On this ground, the judgment of the circuit court was reversed, and the cause remanded, &c.

During the late trial of the issues in the circuit court, the deposition of Jonathan Scholfield was offered in evidence by the plaintiff below, and objected to by the defendant, but the court overruled the objection; and to this opinion of the court, the defendant excepted. The competency of this witness is the only question raised on the present writ of error.

To show the relation of this witness to the cause, and his interest in it, the instruments of writing used in the former trial, and which are above referred to, were given in evidence; and in addition, a release, dated 24th March 1835, from Lloyd to Scholfield, of all liability arising under his letter

of June 9th, 1824, for the payment of costs; and from all responsibility growing out of this suit, in any form or manner whatsoever. A part of the documents referred to as used in the former trial, are not found in the record of the late trial; the clerk of the circuit court, as is alleged, having omitted to certify them. But as those documents were used in the former trial, and are found in the report of the case, in 9 Peters, and as they do not change the result to which the court have come on the present writ of error; there can be no objection to considering them as now before us.

The question is not, whether Scholfield has not been so connected *with the commencement and prosecution of this suit, as to impair his credit with the jury, but, whether he has an interest in the decision of the case? [*149

It is not contended, that the rule which does not permit a party to a negotiable instrument to invalidate it by his own testimony, applies to Scholfield. The rule is laid down in the case of the *Bank of the United States* v. *Dunn*, 6 Pet. 57; and also in the case of *Walton* v. *Shelley*, 1 T. R. 296, as applied to negotiable paper.

From the various releases executed by Lloyd and Scholfield, and the other documents in the case, it is not preceived, that the witness can have any interest in the decision of this suit. He has relinquished all possible benefit in the judgment, should it be entered in favor of the plaintiff below. And he is exonerated from all responsibility should a judgment be given for the defendant. It is clear, from the opinion of the court, as above cited, that Scholfield's liability for costs, was the only ground on which he was held to be incompetent; and this is entirely removed by the release of Lloyd subsequently executed.

On the part of the plaintiff in error, it is contended, that Scholfield stood in the strict relations of privity of estate and contract to both the parties to the suit; and that there was also privity in the action. This may be admitted, when the suit was first commenced; but the question arises, whether this relation to the contract, the estate and the action, has not been dissolved. There can be no doubt of this, unless the rights of other parties as the creditors of Scholfield had become so interwoven in the transaction as not to be affected by the acts of the witness and Lloyd. And this is the ground assumed in the argument. But on a careful examination of the points presented, and the authorities cited, the court do not perceive that there is sufficient ground to pronounce any of the releases executed fraudulent.

The decision in Pet. C. C. 301, where the court held, that a party named on the record might be released, so as to constitute him a competent witness, has been cited and relied on in the argument. Such a rule would hold out to parties a strong temptation to perjury; and we think it is not sustained either by principle or authority.

Scholfield in this case was not a party on the record, and having divested himself of all interest arising out of the original agreement *and the prosecution of this suit, and not being liable to pay costs, we think the circuit court did not err, in admitting his deposition as evidence. The judgment of the circuit court is, therefore, affirmed with costs. [*150

This cause came on to be heard, on the transcript of the record from the

circuit court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*151] *JOHN ZACHARIE and Wife, Plaintiffs in Error, *v.* HENRY FRANKLIN and Wife.

Execution of contract.—Evidence.

Under the laws of Louisiana, and the decisions of the courts of that state, a mark for the name, to an instrument, by a person who is unable to write his name, is of the same effect as a signature of the name.

A bill of sale of slaves and furniture, reciting that the full consideration for the property transferred, had been received, and which does not contain any stipulations or obligations of the party to whom it is given, is not a *cynalagmatic* contract, under the laws of Louisiana; and the law does not require that such a bill of sale shall have been made in as many originals as there were parties having a direct interest in it, or that it should have been signed by the vendee.

Evidence will be legal, as rebutting testimony (as to repel an imputation or charge of fraud), which would not be admissible as original evidence.

ERROR to the District Court for the Eastern District Louisiana. The defendants in error, Henry Franklin and wife, on the 23d of January 1836, presented a petition to the district court of the United States, for the eastern district of Louisiana, for the recovery of certain slaves, with their children, and also of certain stock and household furniture: which the petition alleged had been sold to him by Joseph Milah, by a bill of sale, duly recorded in the proper notarial office. The bill of sale was in the following words:

State of Louisiana, Parish of St. Helena:

Know all men, to whom these presents may come, that I, Joseph Milah, have this day bargained, sold and delivered unto Henry Franklin, his heirs, executors, administrators and assigns, six negroes, namely, one negro woman, named Neemy; one boy, do. John; one do. Sam; one do. Nels; one negro girl, named Harriet; one do. Jenny; together with all of my cattle, hogs, horses, household and kitchen furniture, for the sum of twenty-eight hundred dollars, to me in hand paid; which property I do warrant and defend from me, my heirs, executors and assigns, to him, his heirs, exe-
*152] cutors, administrators and assigns for ever. *In witness whereof, I have hereunto set my hand and seal, this 17th day of July, 1819.

his
(Signed) JOSEPH ⋈ MILAH. [L. S.]
mark

Test:—WM. MCMICHAEL, JOEL OTT.

The condition of the above bill of sale is such, that the above mentioned property remain in my possession so long as I live; and after my body is

consigned to the grave, to remain, as above mentioned, in the above bill of sale.

his

(Signed) Joseph ⋈ Milah,

mark.

Test:—Wm. McMichael, Joel Ott.

(Indorsed.) I certify the within to be truly recorded in register, in page 55, according to the law and usage of this state. In faith whereof, I grant these presents, under my signature, and the impress of my seal of office, at St. Helena, this 23d day of July 1819.

(Signed) James McKie. [seal.]

Joseph Milah died in July 1834; and the petition claimed that the plaintiffs were entitled to the negroes, with their children, and the other property mentioned in the bill of sale; which, at the time of bringing the suit, were in the possession of the defendants; who held and detained them, and had refused to deliver them to the petitioners.

On the 5th day of February 1836, John and Letitia Zacharie answered the petition, admitting they were in the possession of the negroes mentioned in the petition; and they averred, that Letitia Zacharie was in such possession, in her capacity of tutrix of her minor children; who were the lawful proprietors of them, by inheritance from their father, Joseph Milah. They denied that the bill of sale was ever signed by Joseph Milah; and, if signed by him, it was done in error, *and through false and fraudulent representations of the plaintiff, and no consideration was given for the same; and the same was fictitious and collusive, and intended to cover or conceal a disguised donation of the slaves mentioned in the same; and was, therefore, null and void. The defendants asked for a trial by a jury. Afterwards, by a supplemental answer, the defendants said, that, at the time of the alleged sale, under private signature, Joseph Milah had neither children nor descendants actually living; and since the same, the children of which Letitia Zacharie was the tutrix, had been born, and were now living. [*153

On the trial, there was given in evidence by the plaintiffs, among other documents, an instrument executed in South Carolina, Richland district, by Joseph Milah, on the 11th day of July 1805; by which Joseph Milah, under his hand and real, gave a negro wench and a negro boy, and also his personal property, to Sarah McGuire. This deed was regularly acknowledged; and was recorded in the Richland district, in South Carolina, on the 10th December 1805.

The cause was tried by a jury, and a verdict was rendered for the plaintiffs; on which the court gave a judgment. The defendant took two bills of exception. The first bill of exceptions was in the following terms:

On the trial of this cause, the plaintiff offered in evidence an instrument in writing to his petition annexed, and bearing date the 17th July 1819, and purporting to be executed by Joseph Milah, by the affixing of his mark; and offered to prove same by the evidence of William McMichael and Joseph Ott, whose signatures are affixed as subscribing witnesses, which instrument is made part of this bill of exceptions; the defendants objected to the introduction of said instrument and testimony on the ground: 1st, that being an instrument purporting to convey slaves, the same was null and void, as

not having been signed by the vendor; and that no parol proof could be admitted to prove its execution. 2. That a mark is not a signature, within the provision of the laws of Louisiana, in relation to the conveyance of slaves. 3. That the instrument, containing a *synalagmatic* contract or mutual and reciprocal obligation, not being in the form of an authentic act, was invalid, because not made in as many originals as there were parties having a direct interest. 4. That the same was not signed by the vendee. But the court overruled the objections.

The second bill of exceptions was taken to the admission in evidence *of the instrument executed in Richland district, South Carolina, as a gift or donation of two slaves and certain personal property. 1. Because the plaintiffs in their petition claimed to have a title to the slaves referred to in their petition, by virtue of a bill of sale to Henry Franklin, one of the plaintiffs, under date of the 17th July 1819; and that they could not offer evidence to establish title from any other source than that therein stated. 2. Because there was no evidence of the identity of the person by whom this instrument purported to have been executed, with James Milah, under whom plaintiffs claim; nor of the slaves named in the petition.

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The defendants also moved for a new trial, on reasons filed; which motion was overruled by the court. The defendants prosecuted this writ of error.

The case was submitted to the court, by *Benton* and *Preston*, on printed arguments. Mr. Benton read the arguments for the plaintiffs in error; and for the defendants.

The argument for the plaintiffs in error, was as follows: The court, in overruling the motion for a new trial, sums up the evidence; and shows clearly the nature of the case, as established by the facts. The judge states, that it was proved on the trial, that the writing sued upon was executed when Joseph Milah was supposed to be on his death-bed. Then it was made *mortis causâ*, and was intended to be a will, or to have the same effect. It contains the disposal of his negroes and furniture. The subscribing witnesses do not prove any money paid; and we know the man was not trafficking in negroes and furniture, for money, on his death-bed. He was making a donation, *mortis causâ;* and as the judge correctly concludes, was disposing of his half of the community of acquests that had existed between him and his deceased wife, in favor of her sister; as he might do, by the laws of Louisiana, having no children. But by the laws of Louisiana then in force, as well as by the present code, "no disposition, *causâ mortis*, could be made otherwise than by last will; all other form is abrogated" (Civil Code of 1808, p. 226, ch. 6, § 1, art. 81); and being a nuncupative testament, under private signature, should have been attested by five witnesses residing in the parish, and accompanied by many formalities, all detailed at page 228 *of the code; which are not pretended, as to the act of 1819, sued on. All these formalities were essential to its validity, as well as that it should have been probated and ordered to execution. (Code, p. 242, art. 153, 157.) The effect of a will, by the verdict and judgment, is given to the instrument; and yet it was utterly null and void as a will.

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But, as a will, it transferred only one-fifth (though the judge thought one-half, from not adverting to the laws of inheritance) of Milah's half of the property, to the legatee, donee or vendee, by whatever name she is

called. The other four-fifths belonged to Joseph Milah's two children, and forced heirs; of which he could not deprive them by will. (Civil Code of 1808, page 212, art. 19, 22. And yet, strange to think, the judge justifies the jury in giving the other four-fifths, or half, as he supposes, to the plaintiffs, on the ground of damages, in which he concurs; although there is no claim for damages in the petition; and although, if proved (though he states it was merely argued), it would not support a verdict and judgment for title. The ground on which he supports the verdict for the other half of the slaves, is, that not the plaintiff and vendee, in the title sued upon, but his wife, inherited that from her deceased sister. The existence of all these facts, which were offered in support of the verdict, were inconsistent with it, and with the action; and clearly showed that the verdict was contrary to law. This evidence, and these considerations, were undoubtedly offered in lieu of a consideration for the bill of sale, that is, in place of the $2800; but if so, then the sale was simulated, and not real, as pleaded; but a disguised donation or testament, and therefore null, not being made according to law.

The judge further states, that it appeared, that the act was made to avoid the expense of settling Milah's estate in the court of probates. This was not the consideration expressed, but an illegal consideration; and one that ceased as soon as Milah recovered. For these reasons, the act was null (Civil Code, art. 1887); and remained a recorded nullity; and peculiarly so, after the subsequent birth of Milah's children. (Old Code, page 224, art. 74.) Until now, fraudulently revived after his death, when orphans are left to contest that which, from shame, would not have been presented, had he been alive.

But the judge charged the jury, and the counsel of the plaintiffs now argued for the same thing, that, regarding the instrument sued *on as a donation, although, by the old Civil Code, page 224, art. 74, the [*156 law in force at the time, it was revoked by the subsequent birth of children; yet a subsequent law, art. 1556 of the new Code, made the donation revocable only; and the last law is to govern the case. Then, in a donation upon condition, the legislature can dissolve the condition, without the consent of the donor. It is only necessary to state the proposition, to have it rejected; and to induce this high tribunal to instruct the inferior tribunal, to instruct the jury more properly. But the art. 1556 of the new Code, revokes the donation up to the disposable portion; which, in the present case, there being two legitimate children contending for their inheritance, is one-half of the estate. New Code, art. 1480. The donation is not revocable, but revoked to that extent.

These reasons of the judge, the parol testimony adverted to, the written testimony on file, the pleadings, exceptions and grounds for a new trial; all show conclusively, that the private act of 17th July 1819, was not a real transfer of slaves for $2800, in hand paid; and therefore, the verdict declaring it so, was contrary to law and evidence: and the new trial should have been granted by the inferior court, and must be granted by this court. Indeed, the whole proceeding shows such confusion in the minds of the court and jury, as to what they were trying; that substantial justice requires, that the case should be remanded for another trial. They revived an old donation and will, that were dead letters; converted the act of sale

sued on, into a will, though against the very letter of our law; and yet administered the laws of inheritance, and act of testament, upon Milah's succession; and in doing so, made a medley of the laws of Louisiana and South Carolina; and still could not deprive the children of the last fourth of ther paternal inheritance, without taking an account in equity of the rents and profits of the slaves, and enforcing it, by trespass on the case for damages.

The admission of the act sued upon in evidence was opposed; and being admitted, exception was taken thereto. It is liable to three legal objections:

1. It was not recorded in the office of the parish judge of St. Helena, where it was made, and where the parties lived. The law of Louisiana, in force at the time, declared, "that no notarial act concerning immovable property (and slaves were immovable property) shall have any effect against third persons, until the same shall have been recorded in the office of the parish judge, where such immovable *property is situated." (See 3 Martin's Digest of the Laws of Louisiana, page 140.) Mrs. Milah and her children are, as to this transaction, third persons, as to Milah; because she married him, believing him the owner of the slaves in his possession, and there was no recorded outstanding title.

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2. The contract was *synalagmatic*. Milah was bound to keep the slaves, that they might be delivered at his death; and Franklin, to grant the enjoyment to Milah during life, and even to pay the price, if it had not in reality been paid. Yet it was not made in two originals, which the law, in force at the time, positively required, on pain of nullity; it being a writing under private signature. (Old Code of Louisiana.)

3. The mark of Milah is made to the instrument, and not his signature. This objection rests upon our peculiar law, which declares, "that all sales of immovable property, or slaves, shall be made by authentic act, or under private signature." A verbal sale of any of these things shall be null, as well for third persons, as for the contracting parties themselves; and the testimonial proof of it shall not be admitted. (Civil Code, art. 2415.) And in defining acts under private signature, our code declares, that it is not necessary that those acts be written by the contracting parties, provided they be signed by them. (Art. 2238.) It is thought, under uniform decisions in France, upon a similar article, that the words signature, and signed, do not embrace a mark; and this interpretation is the more reasonable, as it is so easy to have the contracts of persons who cannot sign, made before a notary; and it is so important, with regard to the immovable property, and the slaves, of a country.

Exception was also taken to the introduction in evidence, by the plaintiffs, of a title to part of the slaves, and from which the others descended, dated in Richland district, state of South Carolina, on the 11th day of July 1805. The objection is based upon the universal rule, that the evidence in a cause must correspond with the allegations. 1 Stark. Evid. 386; 8 Mart. 400; 3 Mart. (N. S.) 509. The plaintiffs set up no such title in their petition. It is true, the judge states he admitted it only as rebutting testimony to the parol evidence as to fraud; especially, as evidence had been given of a previous disposition of the property. The idea of the judge is not very clear; but it is very clear, that a title has been admitted in evidence, against which

the defendants had no opportunity to prepare to defend themselves; and that much more than a rebutting *effect was given to it, since, in the charge to the jury, and in overruling the motion for a new trial, as [*158 appears by the judge's reasons, it was constantly stated, that although a donation of slaves is not absolutely, but only contingently, translative of property in Louisiana; yet, by the laws of South Carolina, he had an absolute right to donate the whole of his slaves. For all which reasons, the plaintiffs in error pray that the judgment may be reversed, and the cause remanded to be tried again.

For the defendants in error, in the printed argument of Mr. *Preston*, it was said: The plaintiffs below, Franklin and wife, sue to recover from the defendants below, but who are plaintiffs in error, certain slaves, with their increase, in a bill of sale mentioned in, and annexed to, their petition. The defendants, Zacharie and wife, disclaim title in themselves, but set it up for the children of the wife, as heirs of one Milah. They answer, that they do not know, if Milah, their ancestor, ever made the bill of sale; and, if he did, that it was simulated, and intended to cover a disguised donation; and that this donation became null and void, by the subsequent birth of the children of Milah.

The first question presented by the bill of exceptions of the defendants, is, as to the admissibility of the bill of sale of the slaves from Milah, in evidence. The execution of it by Milah, by affixing his mark thereto, he not being able to write, was proved by the subscribing witnesses; and the court admitted it to go to the jury. The denial of the execution of the bill of sale of the slaves, by Milah, must be considered as waived, by the subsequent and inconsistent plea, that it became null and void, by the birth of children. See *Arnold* v. *Bureau*, 7 Mart. 291; *Nagel* v. *Mignot*, 8 Ibid. 493–4. But if, notwithstanding the inconsistency of the pleas, it was necessary to prove the execution of the bill of sale, it has been sufficiently done, by proving, by the subscribing witnesses, that Milah affixed his mark thereto. For a *sous seing prive* act of sale, with the mark of the vendor, is sufficient. It is not requisite, that he should sign his name, to make it valid. This question, which has been raised in Louisiana, by quotations from French writers, has received a judicial decision, since the trial of this case, from the supreme court of the state of Louisiana. *Tagiasco* v. *Molinari's Heirs*, 9 La. 512. "The force and effect to be given to instruments, which have for signatures only *the ordinary marks of the parties to them, depend more upon rules of evidence, than the *dicta* of law, relating [*159 to the validity of contracts required to be made in writing. The genuineness of instruments under private signature, depends on proof; and in all cases, when they are established by legal evidence, instruments signed by the ordinary mark of a person, incapable of writing his name, ought to be held as written evidence. The rules of evidence by which courts of justice have been governed in this state, since the change of government, have been borrowed, in a great part, from the English law, as having a more solid foundation in reason and common sense. According to the rules of evidence, as adopted in this state, the ordinary mark of a party to a contract, places the evidence of it on a footing with all private instruments in

writing." This case has since been confirmed by that of *Madison* v. *Zabriskie*, 11 La. 251.

The next question is raised by the exception taken to the charge of the court to the jury. The judge charged the jury that a donation, under the form of an onerous contract, is not void; and in this he is supported by the decisions of the supreme court of Louisiana. *Trahan* v. *McManus*, 2 La. 209; *Homes* v. *Patterson*, 5 Mart. 693. The defendants required the judge to charge, that, by the art. 74, page 224, of the old Civil Code of the territory of Orleans, a donation became absolutely void, by the subsequent birth of children; and it was in force and to govern in this case. This he refused, because that code was repealed by the act of the legislature of the state of Louisiana, 12th of March 1828, page 66. And the present code of Louisiana, art. 1556, enacted in 1825, revokes donations only up to a certain extent, and under certain circumstances; and this last article (1556) of the Louisiana code, should apply, because the children were born subsequent to its enactment. There is, then, nothing erroneous in the charge of the judge, nor in the admission of evidence; and the judgment should be affirmed.

The defendants below present two other points of objection to the legality of the judge's decision, in the court below. First, for admitting the plaintiffs to give, in evidence, a deed of gift for the same property to plaintiff's wife, in the year 1805; and secondly, for admitting a testamentary bequest of the same property, in favor of plaintiff and wife, in 1834, to be
*160] given in evidence; it being argued, *that this title by gift, was setting up a different title from the one declared on; and that the will, making the bequest, was not duly executed; but the judge overruled the objections, and admitted the evidence, not as titles, but to rebut the plea of a fraudulent conveyance; and to show that Milah was uniform in his determination, from 1805 to 1834, to pass this property, after his death, to the sister of his first wife, with whom he received this property, and who died childless: that sister and her husband being now the claimants of the property, against the children of a second marriage.

Barbour, Justice, delivered the opinion of the court.—This case is brought into this court, by a writ of error to the district court of the United States for the eastern district of Louisiana. It was a suit commenced by the defendant in error, for himself and wife, by a petition, according to the Louisiana practice, for the recovery of several slaves (with their increase), and other property, consisting of stock of several kinds, and household and kitchen furniture; which he alleged had been sold to him by a certain Joseph Milah, by a bill of sale, duly recorded in the proper notarial office; of which bill of sale *profert* is made in the petition, and which is in the following words, viz:

"Know all men, to whom these presents may come, that I, Joseph Milah, have this day bargained, sold and delivered unto Henry Franklin, his heirs, executors, administrators and assigns, six negroes (naming them), together with all of my cattle, hogs, horses, household and kitchen furniture, for the sum of twenty-eight hundred dollars, to me in hand paid; which property I do warrant and defend," &c. (Signed) Joseph Milah, with his mark. To which was added the following condition, viz: "The condition of the above bill of sale is such, that the above-mentioned property remain in my posses-

sion so long as I live; and, after my body is consigned to the grave, to remain, as above mentioned, in the above bill of sale."

The defendants, Zacharie and wife, filed their answer, denying all the allegations in the petition, except as they thereinafter specially admitted. They then proceed to state, that the female defendant was in possession of the negroes referred to in the petition; that she possessed them in her capacity of tutrix of her minor children, John and Josiah, whom she avers to be the lawful proprietors thereof, by a just title, to wit, by inheritance from their father, Joseph Milah; they denied, that the writing attached to *the plaintiff's petition, was ever signed or executed by Milah, and required strict proof thereof; they alleged, that, if it ever were so [*161 signed and executed, it was done in error, and through the false and fraudulent representations of the plaintiff; and that no consideration was ever given or received therefor; that, if it ever were signed or executed by Milah, it was fictitious and collusive, intended to cover or conceal a disguised donation of the slaves therein mentioned; and that as such, it was null and void, not having been made with the formalities required by law; and they prayed for a trial by jury. The defendants afterwards filed a supplemental answer, stating that, at the time when the alleged sale, under private signature, purported to have been executed, Milah had neither children nor descendants actually living; and that legitimate children of said Milah were afterwards born, and were then living. A verdict and judgment were rendered in favor of the plaintiff.

At the trial, one bill of exceptions was taken by the plaintiff, and two by the defendant. As the judgment was in plaintiff's favor, it is unnecessary to consider the exception taken by him; we, therefore, pass, at once, to the consideration of those taken by the defendant, now plaintiffs in error. The first of these was taken to the admission in evidence of the bill of sale, of which *profert* was made in the petition, upon several grounds which amounted in substance to this—that the instrument, being one which purported to convey slaves, was null and void, because it was not signed by the vendor; a mark not being, as alleged, a signature, within the provision of the laws of Louisiana, in relation to slaves; and that no parol proof could be admitted to prove its execution. And that the instrument, being one which contained mutual and reciprocal obligations, and not being in the form of an authentic act, was invalid; because not made in as many originals, as there were parties having a direct interest, and not signed by the vendee.

No adjudged case is produced by the counsel for the plaintiffs in error, in support of the first branch of the objection, that the instrument has the mark, and not the signature of Milah. It is rested on a provision of the law of Louisiana, which declares "that all sales of immovable property, or slaves, shall be made by authentic act, or private signature." Signature is indeed required; but the question is, what is a signature? If this question were necessarily to be decided by the principles of law, as settled in the courts of England and the United States, *there would be no doubt of the truth of the legal proposition, that making a mark is signing, even in [*162 the attestation of a last will and testament; which has been fenced around by the law with more than ordinary guards, because they are generally made by parties, when they are sick, and when, too, they are frequently

inopes consilii, and when they, therefore, need all the protection which the law can afford to them. This principle is fully settled by many cases, amongst others, 8 Ves. 185, 504; 17 Ibid. 459. See also 5 Johns. 144.

But the question has been directly adjudicated in Louisiana. In 9 La. 512, it is said, "that the force and effect to be given to instruments, which have for signatures, only the ordinary marks of the parties to them, depend more upon the rules of evidence than the *dicta* of law relating to the validity of contracts required to be made in writing. The genuineness of instruments under private signature, depends on proof; and in all cases where they are established by legal evidence, instruments signed by the ordinary mark of a person, incapable of writing his name, ought to be held as written evidence. According to the rules of evidence, as adopted in this state, the ordinary mark of a party to a contract, places the evidence of it on a footing with all private instruments in writing." To the same point, see the case of *Madison* v. *Zabriskie*, 11 La. 251. This branch, then, of the objection to the admission of the instrument in evidence, is wholly untenable.

Nor is the other branch of the objection to its admissibility better supported; as the first branch fails, as we have seen, for the want of law to support it; so, this second branch fails, for want of the fact, the assumed existence of which is the only basis on which it rests. That is, it is not in the language of the law, a *synalagmatic* contract; or in other words, it does not contain mutual and reciprocal obligations; to which description of contracts only, does the objection at all apply. All the words in the instrument, as well in its body as in the condition, are the words of the maker of the instrument, the vendor. The vendee does not sign it—he does not speak in it at all. Consequently, there are not, and could not be, any direct stipulations by him, nor can any be implied from its language and provisions; for the paper acknowledges on its face the receipt of the whole purchase-money; and nothing whatsoever was to be done by the vendee.

The second exception taken by the defendant was, to the admission in evidence on the part of the plaintiff, of an instrument of writing, bearing date July 11th, 1805, in the state of South *Carolina, purporting to have *163] been executed by Joseph Milah, as a gift or donation of two slaves, and certain goods and household furniture, to one Sarah McGuire. The court, however, admitted the evidence, and as we think, properly, for the reason assigned in the bill of exceptions. From that it appears, that previously to the offering this last paper, the court had admitted evidence, on the part of the defendant, to prove fraud and want of consideration; and they then admitted the paper thus objected to, as rebutting evidence. Had it been offered, and received by the court, as is objected by the counsel of the defendant in error, as evidence of *title*, it would, under the petition, have been inadmissible; upon the ground of a variance between the allegation and proof. But it was distinctly received, only for the purpose of repelling the parol evidence, which had been given to prove fraud and want of consideration; by showing that Milah had, as early as 1805, manifested a disposition to give the property to the plaintiff's wife, who, as appears from the record, was the sister of the former wife of Milah, who had died without children; the plaintiff's wife is the person named as donee, in the deed before stated, as having been executed by Milah, in South Carolina. When

we speak of the plaintiff in this connection, we mean the plaintiff in the court below, the now defendant in error.

After the verdict was rendered, the defendant in the court below moved for a new trial, for sundry reasons stated on the record, which was refused. The granting or refusing of new trials, rests in the sound discretion of the court below; and is not the subject of reversal in this court. Without making further citations in proof of this proposition, it will be sufficient to refer to 4 Wheat. 220, where it is said by the court, that the first error assigned is, that the court refused to grant a new trial; but it has been already decided, and is too plain for argument, that such a refusal affords no ground for a writ of error. The judgment of the court below is correct, and is, therefore, affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

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*John H. Clarke, Administrator of Willard W. Wetmore, Appellant, *v.* Henry Mathewson, Cyrus Butler, Edward Carrington and Samuel Wetmore, Appellees. [*164

Jurisdiction.—Citizenship.—Bill of revivor.

A bill was filed by W., a citizen of Connecticut, against M. and others, citizens of Rhode Island, in the circuit court of the United States for the district of Rhode Island; an answer was put in to the bill, and the cause was referred to a master for an account; pending these proceedings, the complainant died; and administration of his effects was granted to C., a citizen of Rhode Island, who filed a bill of revivor in the circuit court. The laws of Rhode Island do not permit a person residing out of the state to take out administration of the effects of a deceased person within the state; and make such administration indispensable to the prosecution and defence of any suit in the state, in right of the estate of the deceased: *Held*, that the bill of revivor was in no just sense an original suit, but was a mere continuation of the original suit; the parties to the original suit were citizens of different states; and the jurisdiction of the court completely attached to the controversy; having so attached, it could not be divested by any subsequent proceedings; and the circuit court of Rhode Island had rightful authority to proceed to its final determination.

If, after the proper commencement of a suit, in the circuit court, the plaintiff removes into, and becomes a citizen of, the same state with the defendant, the jurisdiction of the circuit court over the cause is not affected by such change of domicil. Morgan's Heirs *v.* Morgan, 2 Wheat. 290; Mollan *v.* Torrance, 9 Ibid. 537; and Dunn *v.* Clarke, 8 Pet. 1, cited.

The death of a party, pending a suit, does not, where the cause of action survives, amount to a determination thereof; it might, at common law, upon the mere principles of that law, have produced an abatement of the suit, which would have destroyed it; but in courts of equity, an abatement of the suit, by the death of the party, has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination, of the suit; it may again be put in motion, by a bill of revivor; and the proceedings being revived, the court proceeds to its determination as on an original bill.

A bill of revivor is not the commencement of a new suit, but is the mere continuance of the old suit; it is upon ground somewhat analogous, that the circuit courts are held to have jurisdiction in cases of cross-bills and injunction bills, touching suits and judgments already in those courts.

In the 31st section of the judiciary act of 1789, congress manifestly treats the revivor of a suit, by or against the representatives of the deceased party, as a matter of right, and as a mere

continuance of the original suit; without any distinction as to the citizenship of the representative, whether he belongs to the same state where the cause is depending or to another state.[1]

Clarke *v.* Matthewson, 2 Sumn. 262, reversed.

*165] Appeal from the Circuit Court of Rhode Island. Willard W. Wetmore, a citizen of Connecticut, filed a bill, to June term 1830, of the circuit court of the district of Rhode Island, against Henry Mathewson, Cyrus Butler, Edward Carrington and Samuel Wetmore, citizens of the state of Rhode Island; claiming an account of certain mercantile adventures, in which he alleged himself to have been interested, together with the books, invoices and list of passengers on board of the ship Superior, in which he asserted he was interested; and for a full settlement of all accounts between him and the defendants; and for such other and further relief in the premises as the court might think proper.

The separate answer of Henry Mathewson to the complainant's bill was filed in September 1830; the answers of the other defendants having been filed in June or July of the same year. A supplemental answer was afterwards filed by Henry Mathewson; and in November 1831, after various pleadings in the case, counsel having having been heard, the cause was referred to a master to take and state an account between the parties, &c. The parties appeared before the master and his assistants, and an examination of the accounts was had and proceeded in.

In 1834, before a report was made by the master, Willard W. Wetmore died; and administration of his estate and effects was granted by, and out of, the municipal court of the city of Providence, in the state of Rhode Island, to John H. Clarke, a citizen of that state; who thereupon filed a bill in the circuit court to revive the suit, and prayed that the same should stand in the same situation, as at the decease of the original complainant, Willard W. Wetmore. On the 7th of July 1834, Henry Mathewson appeared in the circuit court, denied the jurisdiction of the court, and moved to dismiss the suit, on the ground, that John H. Clarke was a citizen of the state of Rhode Island, as were also the defendants. At November term 1835, the circuit court dismissed the bill, for want of jurisdiction; and the complainant appealed to this court.

The case was argued by *Southard*, for the appellants; and by *Tillinghast* and *Webster*, for the appellees.

*166] *Southard*, for the appellants, contended:—1st. *That the court had jurisdiction of the cause upon the original bill. 2d. That the jurisdiction would not have been taken away by the removal of the complainant to Rhode Island. 3d. That the death of the complainant did not abate, but suspend, the suit; and the jurisdiction of the court was not thereby lost. 4th. That the administrator had a right, in equity, to revive and continue the suit.

The circuit court of Rhode Island had originally jurisdiction of the case; and the parties went on, after the filing of the bill, and the answers, to the examination of the accounts, under an interlocutory decree of the court. While the cause was in this state, the complainant died, and by the laws of

[1] Hatfield *v.* Bushnell, 1 Bl. C. C. 393; Trigg *v.* Conway, Hempst. 711.

Rhode Island, no administration of his affairs could be granted to any one but a citizen of that state. The act of the legislature is express on the subject; and requires that administration of the estates of decedents shall only be given to citizens and residents of Rhode Island. If, then, this cause is to proceed, it must be by a plaintiff or complainant who is a citizen of Rhode Island; and if not, all the litigation between the parties will have been fruitless and unproductive. If the jurisdiction of the court has ceased, a result will occur which would prevail in no other state. The parties must commence a suit in the court of the state, where he may, perhaps, be met with a plea of the statute of limitations; and thus his remedy will be for ever defeated. The case, too, is one peculiar for the jurisdiction of a court of chancery; and the courts of the state of Rhode Island have no chancery jurisdiction.

This is a bill of revivor; and from its nature and purpose, it seeks to restore the case to the chancery docket of the circuit court, in the same situation it was before the death of the original complainant. It does not ask to change the controversy, or to add to it; and it will stand, when revived, in the condition it did before the occurrence of the event which made it necessary to revive it. The bill of revivor is not an original suit; it is nothing more than the means of continuing the suit already commenced. It introduces no new matters for controversy and adjustment; and only furnishes the means of bringing to a close those already in possession of the court. The citizenship, or residence, of the administrator has no connection with the case; *the matters are litigated in the same manner as if the original party was yet alive. It is, then, still a controversy [*167 within the purpose of the judiciary act, which gives the circuit courts jurisdiction of matters in suit between citizens of different states; as all the matters controverted will be those set forth in the bill of the complainant originally filed by him in the circuit court, he being then a citizen of Connecticut.

The death of a porty to a suit in chancery does not abate the suit; it is only suspended. In this the law of chancery differs from the common law: cited, Grant's Chan. 61–2; Cooper's Chan. 64. And this is more especially true, under the judiciary act of the United States, and in the courts of the United States. By the 31st section of the act, administrators and executors are authorized to prosecute suits in the courts of the United States. The object of this section was to carry out the principle that a suit should not abate, if the cause of action survived. Congress intended to supply a remedy, in the case of the decease of a party. It should be shown, there has been a decision on this point by a court of the United States; and until this is done, the plain language of the section will prevail.

Authorities cited, to show, that where jurisdiction has attached, it cannot be divested by anything which does not change the great interests in the cause: Pet. C. C. 444; 9 Wheat. 537; 2 Ibid. 290.

It has not been the course of the courts of the United States, to consider their jurisdiction, after it has once attached, as taken away by the subsequent change of residence of the party. A suit properly commenced between citizens of different states, still proceeds; although the parties may, before its termination, become citizens of the same state. This is a stronger case than where the party dies. It was the act of the party, to become a

citizen of the same state with his opponent; it is by the visitation of God, that the party is this case ceased to have ability to proceed in his cause. Suppose, a citizen of Rhode Island, after taking out administration to the estate of Willard W. Wetmore, had removed to Connecticut; this, if done *bonâ fide*, would give the court jurisdiction. If, immediately afterwards, he returns to Rhode Island, the jurisdiction of the court is not disturbed. Cited, 1 Paine 594.

All the cases which have been decided, have been as to the vesting of the jurisdiction in the courts of the United States originally. *This
*168] is a case in which the jurisdiction has fully and legally vested; and the act of congress declares, that the suit shall not abate by the death of one of the parties. No matter what the form of a bill of revivor may be, it is no more than the instrument to carry into effect the act of congress which declares the suit shall survive.

As to the suggestion, that questions may arise under the bill of revivor, and that they will be questions between citizens of the same state; the court may be aware, that these must be questions in the original suit. They will be incidents to that suit, and to the matters in controversy in it; and no more.

Webster and *Tillinghast*, for the defendants.—The plaintiff alleges, that he was appointed administrator by a court of probate in Rhode Island; and he sets forth various matters, all necessary to his title and claim, and all of which the defendant may legally controvert. The prayer of this bill, which is original as between these parties, is, that a former bill, exhibited in the lifetime of his intestate, when this plaintiff sustained no relation to that bill, its parties, or its subject-matter, may be revived for his benefit and relief, with the benefit and use of all proceedings therein; and all against a citizen of the same state, who resists and controverts his right. This is the controversy of this bill; and it is wholly between citizens of the same state.

The plaintiff's relation to the estate of Wetmore, deceased, was not thrown upon him by the act of God, or the operation of law; but was formed and assumed by his own consent and contract. His title to anything claimed in the former bill, if he has any, is by purchase. If a legal administrator, he is the legal and sole owner of all the property claimed; and the court, under this bill, cannot, it is presumed, deal with any claims to the property beyond those vested in him. But were this otherwise, still it not only does not appear in the bill, that those who may have ulterior claims on him, as creditors, surviving partners, or distributees of the property of the deceased, are citizens of another state; but, on the contrary, the reverse appears. The courts of general jurisdiction are open to him; and there are perfect remedies therein, for every grievance, in those courts.

It required legislative power, to enable an administrator to come into a suit, pending at the death of his intestate, to revive and continue the pro-
*169] ceedings in a court of general jurisdiction. State legislatures, *have, therefore, passed enabling statutes, applicable to state courts. Judicial power to that effect, was and is wanting, without legislative enactment; even in courts of general jurisdiction. Congress has not attempted to invest the federal courts with the power now claimed for them by the plaintiff;

nor could congress give jurisdiction beyond the limitations of the constitution.

It is contended for the defendant, that the whole current of decisions runs against the jurisdiction now asserted by the plaintiff. "If there are not proper parties to the suit, as it stands on the bill of revivor, that circumstance may, it would seem, be pleaded to such bill." Beames's Pleas in Eq. 304; 11 Ves. 313. It is true, on obvious grounds, that a defendant to a bill of revivor cannot plead a plea which has been pleaded by the original defendant and overruled; nor, it is presumed, one which might have been pleaded by original defendant, but waived or omitted at its proper time. Beames, *ubi supra; Samuda* v. *Furtado*, 3 Bro. C. C. 70. Nor is a cross-bill liable to any plea which will not hold to the original bill; nor to a plea to jurisdiction, though the original might be. Beames 310. Because a cross-bill is in the nature of a defence selected by the adverse party, the *reconventio* of the civil jurisdiction. Wood's Inst. Civ. Law, 325, &c. Such cases leave it supposed and granted, that, in the case now in question, the objection is good.

The very point of jurisdiction raised by the plea in this case, has been decided in the courts of the United States, and in favor of the view taken by the defendants. *Chappedelaine* v. *Dechenaux*, 4 Cranch 306. Also the case, *Potter* v. *Rhodes*, decided in the circuit court of the United States for Rhode Island district, November term 1806. The suit was by Potter, of Massachusetts, against Rhodes, of Rhode Island. Potter died during the pendency, and his administrators appeared, end were admitted as such to prosecute. It then appeared, that one of them was a citizen of Rhode Island; and the court decided that it had no jurisdiction for that cause. The court always looks solely to the record. There is no case in which they look out of it; for the record is always of the party's own making. It is on this ground, they always refuse to go into questions of the removal of a party, after a suit has been instituted. The only question is, does it appear on the record, that the parties are citizens of different states? and this appearing, the court go no farther.

The law might have been more advantageous to parties litigating *in the courts of the United States; but it is not so; and the law must prevail. There are other cases of great hardship, and producing great embarrassment; the case of all the parties being required to be citizens of another state. This is a hardship, but it cannot be helped. The law is positive, and the courts are obliged to obey it. [*170

The bill of revivor says the original suit has abated, and asks to revive it as a controversy between the administrator and the defendant. While the matters in dispute between the original parties may remain, there may be others which will be raised by the bill of revivor, and these will be between citizens of Rhode Island exclusively. Suppose, it shall become necessary to fill a cross-bill, it must be filed by a citizen of Rhode Island, against another citizen of that state. This seems to be conclusive of the question.

Story, Justice, delivered the opinion of the court.—This is the case of an appeal from the circuit court of the district of Rhode Island. The original cause was a bill in equity brought by Willard W. Wetmore,

deceased, a citizen of Connecticut, against the defendants, Henry Mathewson and others, all citizens of Rhode Island, for an account, upon certain transactions set forth in the bill, and with a prayer for general relief. After the cause was at issue, upon the hearing, it was, by agreement of the parties, ordered by the court to be referred to a master to take an account; and pending the proceedings before the master, the intestate died. Administration upon his estate was duly taken out by the present plaintiff, John H. Clarke, in the state of Rhode Island; the laws of Rhode Island requiring, that no person, not a resident of the state, should take out letters of administration; and also making such administration indispensable to the prosecution and defence of any suit in the state, in right of the estate of the intestate. Clarke filed a bill of revivor in the circuit court, in June 1834, in which he alleged himself to be a citizen of Rhode Island, and administrator of Wetmore, against the defendants; whom he alleged, also, to be citizens of the same state. So that it was apparent upon the face of the record, that the bill of revivor was between citizens of the same state. Upon motion of the defendants, at the November term of the circuit court, A. D. 1835, the court ordered the bill of revivor to be dismissed for want of jurisdiction; and from this decretal order, the present appeal has been taken by the appellant. *The case, as it was decided in the circuit court, is reported in 2 Sumn. 262, 268; and the ground of dismissal was, that the bill of revivor was a suit between citizens of the same state.

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The judiciary act of 1789, ch. 20, § 11, confers original jurisdiction upon the circuit courts, of all suits of a civil nature, at common law and in equity, where the matter in dispute exceeds the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party; or the suit is between a citizen of the state, where the suit is brought and a citizen of another state. If, therefore, the present had been an original bill, brought between the present parties, it is clear, that it could not have been maintained; for although the plaintiff could sue *en autre droit*, and as administrator of a citizen of another state; yet the suit would be deemed a controversy between him and the defendants, and not between his intestate and the defendants. This is the necessary result of the doctrine held by this court in *Chappedelaine* v. *Dechenaux*, 4 Cranch 306, and *Childress* v. *Emory*, 8 Wheat. 642. The circuit court treated the present case as falling within the same predicament. In this, we are of opinion, that the court erred. The bill of revivor was, in no just sense, an original suit; but, was a mere continuation of the original suit. The parties to the original bill were citizens of different states; and the jurisdiction of the court completely attached to the controversy. Having so attached, it could not be divested by any subsequent events; and the court had a rightful authority to proceed to a final determination of it. If, after the commencement of the suit, the original plaintiff had removed into, and become a citizen of, Rhode Island, the jurisdiction over the cause would not have been divested by such change of domicil. So it was held by this court, in *Morgan's Heirs* v. *Morgan*, 2 Wheat. 290, 297; *Mollan* v. *Torrance*, 9 Ibid. 537; and *Dunn* v. *Clarke*, 8 Pet. 1.

The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of the suit. It might, in suits at common law, upon the mere principles of that law, have produced an

abatement of the suit, which would have destroyed it. But in courts of equity, an abatement of the suit, by the death of a party, has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination, of the suit. It may again be put in motion, by a bill of revivor, and the proceedings being revived, the cause proceeds to its *regular determination, as an original bill. The bill of revivor is not the commencement of a new suit; but is the mere [*172 continuation of the old suit. It is upon a ground somewhat analogous, that the circuit courts are held to have jurisdiction in cases of cross-bills, and injunction bills, touching suits and judgments already in those courts; for such bills are treated not strictly as original bills, but as supplementary or dependent bills, and so properly within the reach of the court; although the defendant, who was plaintiff in the original suit lives out of the jurisdiction. A very strong application of the doctrine is to be found in the case of *Dunn* v. *Clarke*, 8 Pet. 1; where an injunction-bill was sustained, although all the parties were citizens of the same state; the original judgment, under which the defendant in the injunction-bill made title, as the representative in the realty of the deceased, having been obtained by a citizen of another state, in the same circuit court.

But if any doubt could, upon general principles, be entertained upon this subject, we think it entirely removed by the 31st section of the judiciary act of 1789, ch. 20. That section provides, that where, in any suit pending in the courts of the United States, either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment, and that the defendant shall be obliged to answer thereto accordingly; and the court before whom the cause is depending, is empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. Other auxiliary provisions are made to carry this enactment into effect. Now, in this section, congress manifestly treat the revivor of the suit, by or against the representative of the deceased, as a matter of right, and as a mere continuation of the original suit, without any distinction as to the citizenship of the representative, whether he belongs to the same state, where the cause is depending, or to another state. Of the competency of congress to pass such an enactment, under the constitution, no doubt is entertained. The present case falls directly within its purview; and we are, therefore, of opinion, that the decree of the circuit court, dismissing the bill of revivor, ought to be reversed; and the cause remanded to the circuit court for further proceedings.

I take this opportunity of adding, that I fully concur in all the *reasoning of this court on this subject. After the decision had been made in the circuit court, upon more mature reflection, I changed [*173 my original opinion; and upon my expressing it in the circuit court, and upon the suggestion of the judges of that court, the case has been brought here for a final determination. I hope, that I shall always have the candor to acknowledge my errors in a public manner, whenever I have become convinced of them.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Rhode Island, and was argued by counsel: On consideration whereof, it is now hereby ordered, adjudged and decreed by this court, that the decree of the said circuit court, dismissing the bill of revivor in the cause, ought to be, and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, in conformity to the opinion of this court, and according to law.

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*174] *Martha Bradstreet, Plaintiff in error, *v.* Anson Thomas.

Writ of right.—Evidence.

It is error, on the trial of a writ of right, before the grand assize, to prevent the introduction of written evidence; because, in a trial between the demandant, offering the testimony, and a defendant, claiming in opposition to the demandant, under the same title with that of the defendant, before the grand assize, the court had frequently examined the title set up by the written evidence offered, and had become fully cognisant of it; and had, in that trial, at the suit of the demandant, in which it had been produced, decided that it in nowise tended to establish a legal title to the land in controversy in the demandant.

The demandant has a right to place before the assize all the evidence which she thinks might tend to establish her right of property, which has been ruled to be competent evidence in another suit; and against the competency of which, nothing is objected in this suit; and the assize have a right to have such evidence before them, that they may apply to it the instructions of the court, as the law of the case, without which they cannot do it.

There is a safer repository of the adjudication of courts, than the remembrance of judges; and their declaration of them, is no proof of their existence.[1]

Error to the District Court for the Northern District of New York. This was a writ of error prosecuted by the demandant in the district court of the northern district of New York, in a writ of right sued out by her.

The case was fully argued by *Meyer* and *Jones*, for the plaintiff in error; and by *Beardsley*, for the defendant. The judgment of the district court was reversed on a single point, the rejection of certain evidence offered by the plaintiff. No opinion was given on any other question in the cause; and the arguments on the numerous points presented to the court, and argued by the counsel for the plaintiff and defendant, are, therefore, omitted.

Wayne, Justice, delivered the opinion of the court:—We will direct our attention to a single point in this cause, because it is the most important in principle and practice; and is, in our opinion, conclusive of the judgment which this court must render upon this writ of error.

The tenant in the writ of right, upon the trial of the cause, having given
*175] his evidence, and rested his cause upon it, the demandant, upon *the court's deciding that the tenant had proved enough to put her on the proof of the *mise* on her part, gave certain oral testimony in support of her right, with an exemplification of a decree of the court of chancery in the state of New York, under the seal of the court. The counsel for the tenant then inquired, whether the demandant intended to offer any new or different evidence from that heretofore offered by her, in other trials had in that

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[1] See Bradstreet *v.* Potter, 16 Pet. 317.

court, in writs of right, by the demandant against Henry Huntington and others, for other portions of Cosby's manor, claimed by the demandant, by virtue of the same title deeds by which the premises in question were claimed. To this inquiry, the demandant replied, that she had no other or different evidence; whereupon, the counsel for the tenant objected to the evidence, which he then understood was to be offered by the demandant—alleging that it had been given in evidence on former trials, in writs of right between the demandant and Henry Huntington and others, for other portions of Cosby's manor; and had been solemnly considered, on a motion for a new trial, in the cause of the said demandant against Huntington; and that it was then decided, by this court, that the evidence of the demandant, then offered, and now intended to be offered, in nowise tended to establish a legal title to any portion of the land in Cosby's manor, now in controversy. That the evidence, therefore, intended to be offered by the demandant, would have established no right or title in her to the premises in question; and was immaterial and irrelevant. Whereupon, the said judge decided, that inasmuch as the evidence to make out the asserted title of the demandant to these and other lots in Cosby's manor, had been frequently examined by him, on other trials in behalf of the said demandant, against the tenants of land in Cosby's manor, whereby he had become fully cognisant of the same; and that, as he had solemnly considered the same, on a motion for a new trial, in the case of Henry Huntington, at the suit of the demandant; and had come to the conclusion, that the said evidence tended in nowise to establish a legal title to any portion of the land in controversy, in the said demandant; he was, therefore, bound to overrule the same, as insufficient in law, and therefore, immaterial and irrelevant. The demandant excepted to this decision, stating she would offer each piece of her testimony, separately, and in succession, in evidence to the grand assize. As they were offered, they were rejected by the court.

The evidence rejected were several documents, tending, as the demandant *supposes, to establish that she was seised of the premises in question; and as each was presented, it was overruled by the court, the demandant excepting to the decision. Certain facts were then admitted to be in evidence, not embracing, however, any point to which the rejected testimony was supposed to apply; and the court delivered as its opinion to the assize, that by the practice in a writ of right, the tenant was required to begin by offering his testimony. That this rule seemed to imply, that he must adduce some testimony; although to what extent or effect, seemed not very clear, from any treatise on this antiquated form of action. In this instance, the proof adduced by the tenant, did not show title or possession in himself. Still, he deemed it sufficient to put the demandant to the proof of her seisin or better title in herself; and she having failed to give such proof, was not entitled to recover; and that the grand assize ought, therefore, to find a verdict in favor of the tenant. To this charge of the court, the demandant excepted. [*176

This statement, it seems to us, shows the error in rejecting the evidence. If the demandant was put to the proof of her seisin or better title before the grand assize, who were sworn to say which of the parties had the "mere right to have the messuages and tenements," under the direction of the court as to the law applicable to the facts; the demandant had a right to

place before the assize all the evidence which she thought would tend to establish her right of property, which had been ruled to be competent evidence in another suit; against the competency of which, nothing was objected in this suit; and the assize had a right to have such evidence before them, that they might apply to it the instructions of the court, or law of the case, without which they could not do so. When the court undertook in this case to give what it said was the law of the case, because it ruled the law upon the same evidence in another case, rejecting it in this; we have its own admission, that the evidence was competent in that case, and necessarily was competent in the case before it; if the papers offered were authenticated in such way as the law requires, or were of that class, which do not need official authentication as proof by witnesses. No objection of that kind was made. The footing upon which the rejection of the evidence is put by the court, is, that having frequently examined it in other trials, and considered it on a motion for a new trial, in the case of Huntington at the suit of the demandant, it had come to the conclusion, that the evidence tended in nowise to establish a legal title to any portion of the land *in controversy, in the demandant. Nothing was said of its inad- [*177] missibility. The evidence was excluded, upon the ground of past adjudication, upon the court's declaration of that fact, without record evidence of any such verdict or judgment. There is a safer repository of the adjudications of courts, than the remembrance of judges; and their declarations of them, is no proof of their existence.

But in what way is it attempted, in argument, to maintain the correctness of the rejection of this evidence? The learned counsel of the tenant, in his very able argument in support of it, says it was rightly rejected; because it did not prove, nor tend to prove, that the demandant was seised of the premises in question; that the deed which made the first link in the chain of the demandant's title was void; and continuing his analysis of the rejected testimony through all the chain, from Ten Eyck's deed, to its last link, Mrs. Livius's will; he argues, that in no event can the demandant show that seisin in herself which will oust the tenant. May not the demandant very well reply, how do you obtain your knowledge, and come to your conclusion upon my title? Is it upon evidence in the cause; or upon that which, at your instance, was rejected as evidence? If the latter; can it be used upon an exception to its rejection in a trial, upon a writ of error, sued out by the demandant to overrule that rejection; in order that it may be given as evidence in another trial in the court below, to show what will be the legal effect of that evidence upon the demandant's title? The object of the writ of error is to make these rejected papers evidence; and until they are so made, they cannot be used for any purpose. This court cannot, nor can the court below, judicially know what the legal effect of these papers will be upon the demandant's title, until they have been below as evidence; and the error in rejecting them arose from the court's not having discriminated, at the moment, betwen judicial evidence of a fact, and the knowledge whlch it personally had of that fact, in the course of its administration of the law.

We purposely abstain from considering any other point in the argument of the counsel for the tenant; as we could not do so, without discussing

the rights of the parties, which are not put, by any exceptions on this record, before this court.

BALDWIN, Justice, dissented. THOMPSON, Justice, did not sit in this case.

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*JOSEPH S. CLARKE and RICHARD S. BRISCOE, Appellants, *v.* [*178
WILLIAM G. W. WHITE, Appellee.

Specific performance.—Answer in chancery.—Composition with creditors.—Fraud.—Recording of deeds.

The doctrine of a court of chancery, in cases for specific performance, has reference, ordinarily, to executory agreements for the conveyance of lands; and is rarely applied to contracts affecting personal property. Where the relief prayed for in a bill, is the delivery to the complainant of instruments to which he is entitled, and not the execution of an executory contract, any further than to decree the amount the complainant has been compelled to pay against the terms of the contract, chancery has jurisdiction of the cause; and the court will end the cause, without sending the parties to law as to part, having granted relief for part.[1]

The rule in chancery is, if the answer of the defendant admits a fact, but insists on matter by way of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance.

It is generally true, in cases of composition, that the debtor who agrees to pay a less sum in the discharge of a contract, must pay punctually; for until performance, the creditor is not bound. The reason is obvious; the creditor has the sole right of modifying the first contract, and of prescribing the conditions of its discharge; if the agreement stipulates for partial payments, and the debtor fails to pay, the condition to take part is broken, the second contract forfeited, and is no bar to the original cause of action.

In a composition for a debt, by which one party agreed to deliver goods to the amount of seventy per cent. in satisfaction of a debt exceeding $10,000, and omitted to deliver within $1.41 of the amount, the mistake is too trivial to deserve notice.

The true rule as to the interference of a court of equity in relation to contracts, in which fraud is alleged, was laid down in Conard *v.* Atlantic Insurance Co., 4 Pet. 297: "If the person against whom fraud is alleged, should be proved to have been guilty of it in any number of instances; still, if the particular act sought to be avoided, be not shown to be tainted with fraud, it cannot be affected by those other frauds, unless in some way or other it be connected with, or form a part of them."

In equity, as in law, fraud and injury, must concur to furnish ground for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognisance. Fraud ought not to be conceived—it must be proved, and expressly found.

By the common law, a deed of land is valid, without registration; and where registry acts require deeds to be recorded, they are valid, until the time prescribed by the statute has expired; and if recorded within the time, are as effectual from the date of execution, as if no registry act existed.

Where there is clearly a *bonâ fide* grantor, the grant is not within the statutes against fraudulent conveyances.

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[1] Where the law does not afford adequate redress, by compensation in damages, for the detention of personal chattels, a court of equity will entertain jurisdiction. McGowin *v.* Remington, 12 Penn. St. 56; Beasley *v.* Allyn, 12 W. N. C. 91. It will compel the delivery of securities wrongfully withheld. Kobbi *v.* Underhill, 3 Sandf. Ch. 277. Where a principal has executed and deposited with his agent, negotiable obligations, to be issued in certain contingencies, which do not occur, and the agent refuses to return them, on demand, an equitable action will lie, to compel him to surrender the securities, and for damages for the detention; or, if a surrender cannot be made, for their value, as valid obligations. Western Railroad Co. *v.* Bayne, 75 N. Y. 1. And see Evans *v.* Van Hall, Clarke Ch. 22.

W. purchased a lot of ground in the city of Washington, early in 1829, for $1532, on a credit of one, two and three years, and paid the notes at maturity; he took possession immediately after the purchase, and commenced improving, by erecting buildings on it. On the 14th of *January 1832, Smith, who had sold the land, at the request of W., conveyed it to a trustee, for the benefit of the infant children of W. The improvements, before the deed, amounted in value to $3000, and after the deed, to $1200, or $1500; he failed in December 1833; and the property was then worth about $6000. The deed of conveyance by Smith, was not recorded until within one day of the expiration of the time prescribed for recording such deed, by the statute of Maryland. The parties who made a composition of a large debt due to them by W., in which composition they sustained a loss of thirty per cent., knew, at the time of the composition, of the conveyance of this property to the infant children of W. and of his large improvements on the same; and made the composition with this knowledge. The court refused to declare the agreement of composition void, because of this transaction; he who purchases unsound property, with knowledge of its unsoundness at the time, cannot maintain an action against the seller; so, if one compounds a debt, or makes any other contract, with a full knowledge of all the facts, acting at arm's length, upon his judgment, and fails to guard against loss, he must abide by the consequences; neither fraud nor mistake can be imputed to such an agreement.

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If, upon failure or insolvency, one creditor goes into a contract of general composition common to the others; at the same time, having an underhand agreement with the debtor, to receive a larger per cent., such agreement is fraudulent and void.

The rule cutting off underhand agreements, in cases of joint and general compositions, as a fraud upon the other compounding creditors, and because such agreements are subversive of sound morals and public policy, has no application to a case where each creditor acts not only for himself, but in opposition to every other creditor, all equally relying on their vigilance to gain a priority; which, if obtained, each being entitled to have satisfaction, cannot be questioned.[1]

The debtor may prefer one creditor, pay him fully, and exhaust his whole property, leaving nothing for others equally meritorious.

Before a composition was made by a debtor with two of his creditors, who were partners, in which it was agreed that certain notes given by him to the creditors, should be delivered up to him, two of the notes, among those agreed by the composition to be delivered up, had been, before they were at maturity, passed away by the creditors. The debtor asked, by a bill filed against his creditors, with whom he had made the composition, that the court should order these notes to be delivered to him: *Held*, that the decree of the circuit court, refusing to order these notes should be delivered up, was correct.

White *v.* Clarke, 5 Cr. C. C. 102, affirmed.

Appeal from the Circuit Court of the District of Columbia, and county of Washington. In the circuit court, the appellee, William G. W. White, filed a bill against the appellants, charging, that on the 2d July 1832, the complainant passed to the defendants, Clarke & Briscoe, his twenty-six promissory notes of that date, each for the sum of $274.67, payable monthly, from sixteen to forty-four months, making the sum of $7141.42; *three of which said notes were subsequently passed by said defendants to Clagett & Washington. That on the 30th December 1833, he entered into an agreement with the said Clarke & Briscoe, to anticipate the period of credit on the said notes, and to pay the said sum of $7141.42, in goods and merchandise, at seventy cents in the dollar, on the price the said goods were

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[1] A composition agreement between a debtor and several of his creditors, is binding upon the parties thereto, unless it appear that it was contingent upon all the creditors uniting therein. Laird *v.* Campbell, 92 Penn. St. 470. S. P. Renard *v.* Tuller, 4 Bosw. 107; Hall *v.* Merrill, 5 Id. 266. And where a creditor becomes party to a composition deed, and subsequently receives from the debtor better security for his claim, than that provided for by the composition, this is not fraudulent as to the other creditors, unless done in pursuance of a prior or contemporaneous agreement with the debtor. Hagen's Appeal, 11 W. N. C. 86.

marked to have cost; that the said Clarke & Briscoe agreed to receive the said goods and merchandise, on the terms aforesaid, in full payment of the said sum of money, and to deliver up the said notes then in their possession; and speedily to take up such of the said notes as had been negotiated, and to deliver the whole to the complainant, that they might be cancelled. The complainant stated, that he fulfilled his part of the agreement in every particular; that he delivered to said Clarke & Briscoe, and they received goods and merchandise, according to the terms of the said contract, to the full amount agreed to be delivered, save a fraction of $1.41, which was subsequently tendered and refused; but that the said Clarke & Briscoe, having obtained possession of the said goods, retained the said notes, and refused to perform their part of the said agreement. The complainant, in a supplemental bill, stated that Clagett & Washington, to whom three of the said notes had been passed by the defendants, after the date of the said agreement, instituted suits against the complainant, on the said three notes, in the circuit court of the district of Columbia; and that by judgment of the said court, the complainant had been obliged to pay, and had paid, to the said Clagett & Washington, the sum of $1083.55. The complainant prayed, that Clarke & Briscoe might be, by decree, ordered to bring into court the said unpaid notes, to be cancelled; and to pay to the complainant the said sum of $1083.55, so paid to Clagett & Washington; and for general relief.

The answer of the defendants, the appellants, admitted that the complainant gave the several promissory notes mentioned in the bill, and that three of the same were passed to Clagett & Washington, as stated; and they said the consideration for the notes, was the sale of a large invoice of goods, made about the time of the dates of the notes, or shortly before; that the terms and conditions of such sales were, that the complainant should punctually take up and pay the notes, as the same should respectively fall due; and in *consideration of the complainant's solemn verbal pledge and assurance, that such notes should be so punctually [*181
taken up and paid; and upon the faith and confidence of such pledge and assurance, the defendants agreed to deduct five per cent. from the amount of said invoice, and accordingly from the aggregate amount, for which the complainant passed his notes, on account of said sale. The defendants denied, that they did make the agreement with complainant, respecting the compromise of their claim against the complainant, and the cancelling of the notes, in the terms and upon the conditions set forth in the bill; but they admitted and averred, that about the time mentioned in the bill, in consequence of hearing the complainant had failed in business, and was compromising with his creditors, a conversation and arrangement did take place between the defendant, Clarke, and the complainant; in which the defendant asked him, upon what terms the complainant would settle the whole claim of the defendants; not merely on what terms he would settle the amount of the notes; upon which complainant offered to settle it at sixty cents in the dollar, and pay in goods. Clarke answered, that he understood the complainant had compromised with other of his creditors at seventy cents in the dollar; and hoped the complainant would not think of putting off the defendants with less; and the complainant at length agreed to pay the defendants, in goods, the whole amount of their

claim, at the rate of seventy cents in the dollar, and pay the balance, viz., thirty per cent., when he was able ; but insisted, that they should take the goods in masses, without selection, as they lay upon the shelves ; which was finally agreed to by defendant, Clarke ; nor was it till after the arrangement had been so agreed on between themselves, that anything was said between them about the defendants' getting up and cancelling the complainant's notes ; but, afterwards, they admitted a conversation on that subject did ensue between defendant, Clarke, and the complainant, in which it was understood and arranged between them, that, upon the settlement of the defendants' whole claim, by paying the same in goods, at the rate of seventy cents in the dollar, the defendants should get in and cancel said notes ; not upon the settlement, in that mode, of the amount of the notes merely : such was not the understanding of the parties, at least, not of either of the defendants ; but the true amount of their just claim against the complainant ; the amount understood by defendant, Clarke, at the time, was not the aggregate amount of the notes merely, but of the original invoice ; in liquidation of the amount of which, with *a deduction of five per cent. the notes had been given ; and inasmuch as that deduction had been allowed, upon the faith and confidence alone of the complainants' pledge and assurance to pay the notes punctually, as aforesaid ; and as he had totally failed to comply with said pledge and assurance, the defendants considered that, in equity, indeed, in strict justice, they were entitled to the amount of the invoice, without such deduction.

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The answer of the defendants further stated, that the complainant had not, to the time of filing the answer, complied, substantially, or otherwise, with the terms of the compromise, in the sense in which it was properly understood and agreed upon, so as to entitle him at any time to call in the notes given for the goods delivered to him ; that the notes were to be delivered to him, on the entire settlement of the claims of the respondents on him, he not having delivered goods to the respondents to the amount of the bill, and he having refused to deliver the goods to the respondents, without the said deduction. That the goods delivered to the respondents were the residue or remains of the goods originally sold to the complainant, after he had enjoyed the use and profit of them, as a part of his assortment of goods, for eighteen months ; and if the compromise had been carried fully into effect, it would have been a most hard and disadvantageous one to the respondents. The compromise was not binding on the respondents, in consequence of the gross frauds and impositions practised by the complainant upon the respondents, and his other creditors, in order to alarm them into compromises of their debts with him, as with a merchant debtor, who had been subjected by the casualties of trade to failure ; that the whole matter of the pretended failure of the complainant, was a deliberate, artful and fraudulent scheme, device and contrivance of the complainant to alarm and force his creditors into compromises ; while he had, in part, ample means to pay off all his debts, and have a surplus on hand ; that with these ample means, he proclaimed his insolvency, and was thus enabled to make advantageous compromises with his creditors, according to the circumstances of his creditors, and the state of their fears. That preparatory to this scheme of fraudulent failure, and during the very season, and shortly before it was proclaimed, he had made unusually large

purchases on credit, and had so increased his stock of goods much beyond its usual amount; and just after he had completed this fraudulent accumulation of stock, he gave out his failure in business and insolvency, and set on foot his plan of *fraudulent compromises. It was under the greatest pressure of this alarm, and whilst it was fraudulently used [*183 by complainant, to practice upon the fears of his creditors, that the defendants were fraudulently and deceitfully drawn by him into such agreement, for a compromise, as they had stated and admitted.

The answer further stated, that it was the belief of the defendants, that the complainant had for some time meditated the frauds perpetrated by him; and that before he purchased the goods from the defendants, some time about the 9th of July 1832, he caused to be entered in the land records of this county, a fraudulent deed, settling valuable property on his family, which had been executed in the month of January preceding; and in the meantime kept secret. This deed conveyed the property described in it to a trustee, for the children of the complainant, all minors, and in extreme youth; and was not recorded, until within one day of the six months allowed by the law of the district of Columbia, had nearly expired.

To the answer of the defendants, a general replication was filed, and the parties went on to take depositions to maintain or deny the allegations in the pleadings. No evidence was given to sustain the assertion in the answer, that the complainant agreed, at any time, to pay the residue of the debt to the defendants, if he should be able, at any time afterwards, to pay the same. The evidence contained in these depositions is fully stated in the opinion of the court. The circuit court gave a decree in favor of the complainant, according to the prayer of the bill; and the respondents prosecuted this appeal.

The case was argued by *Hoban* and *Jones*, for the appellants; and by *Marbury* and *Key*, for the appellee.

The counsel for the *appellants* contended:—1. The complainant had laid no ground in his bill for equitable relief. Neither the agreement itself, as alleged in the bill, nor any of the collateral circumstances, being of a nature to call for specific performance, or any other relief in equity. 2. But whatever the terms or the nature of the composition, and however fit it may be in its own nature for specific performance in equity, the whole of the complainant's equity is repelled by a countervailing equity in defendants, from his promise, as one of their concomitant inducements to the composition, to pay the full amount *of the debt, when able to do so; and from the [*184 fact, both averred and proved, that he was able to pay the whole debt. 3. A composition of a failing trader with his creditors, being *strictissimi juris*, must be fulfilled by the debtor to the letter; and any failure in complying with its terms, in a minute particular, on his part, however far he may go in part performance, vitiates and annuls the whole composition. 4. According to the complainant's own showing, he has failed to fulfil the composition *in terminis;* and he has, to this day, something further to do, in order to fulfil it; yet he has not even been decreed to fulfil it. 5. There is no evidence in the cause competent and sufficient to overrule so much of the answer as denies the agreement for composition alleged in the bill, and avers a materially different agreement. 6. Taking the terms of

the composition to be such as the answer avers, and puts in the place of what it denies; there appears a still more important, palpable and fatal breach of its terms on the part of complainant. 7. The actual frauds, which the answer charges, in the elaboration of the scheme of artificial and feigned failure and insolvency for defrauding the creditors of their dues, and overreaching them with unfair compositions, under deceitful pretexts, are fully made out in proof; and are sufficient, and more than sufficient, to set aside the complainant's composition with the defendants, and every composition with his other creditors. 8. The inequality alone in his various compositions with his creditors (all the other circumstances of fraud being out of the question) is a fraud, *per se*, both at law and equity; and sufficient of itself, either at law or in equity, to vitiate and set aside each and every of the compositions, from the lowest to the highest.

The counsel argued, that the actual proofs in the case not only sustain the answer on the second ground of defence throughout, but make out a far stronger case, in detail, than the general averments of the answer had represented it. They argued as to the long concocted and prepared scheme of fraud, with a view to failure in business and feigned insolvency; and to consequent compositions with creditors, under the pressure of alarm for the safety of their debts; two prominent facts are, in addition to many minuter circumstances, fully and conclusively proved. 1st. As to the settlement of certain real estate on his minor children, *as stated in the answer. It *185] appears, that in 1829, he purchased the property in his own name, and on his own account, and gave his notes for the purchase-money by instalments, and was to receive a conveyance, upon payment of the last instalment; that he duly paid up all the instalments out of his own proper means and resources; that when, upon payment of the last instalment, he called for a conveyance, he took it to his brother, a youth of 17 or 18 years, in trust for his three children, the oldest of whom was then only five years old, and consequently, was less than two years old at the time of the purchase, more than three years before; that he had never given the slightest intimation, during all the three years he had held and improved the property, of any trust for his children, till he called for such conveyance; and that he had expended about $4500 of his own money in buildings upon the property—$3000 before, and $1500 after the conveyance in trust. The deed bears date on the 14th January 1832, and was not produced for public record, till the 13th July following, the very day before it would have run out of date; and in the meantime, whilst that conveyance was kept secret, and he stood forward as the ostensible owner of the property, he contracted this large debt to the defendants, by a purchase of their goods to the amount of near $13,000; just ten or eleven days before he produced the deed, and had it committed to public record. There is no averment or pretence, either in pleading or evidence, of any good or valuable consideration for this settlement; on the contrary, the terms and recitals of the deed itself, and all the circumstances in evidence conclusively repel the presumption of any such consideration. 2d. That in laying in his stock of goods for the fall season of 1833, by purchase of goods in the northern cities, at a time just before his alleged failure in business, and when he must have necessarily anticipated the result, if it arose from any real difficulty and embarrassment in his circumstances; he purchased a much larger stock than he had ever

been accustomed to lay in; and with all this increased stock, or the proceeds, fresh and full in hand, suddenly and unexpectedly to all the world, announced, not any mere difficulty and embarrassment in his affairs, but absolute and hopeless insolvency, and an immense deficit of assets in proportion to his debts; and upon that footing, negotiated his compositions with his creditors.

As to the charge of an artificial and feigned failure and insolvency, *the actual proof in the cause is cogent to the conclusion, that he broke full handed; with abundance of assets to pay all his debts; [*186 and that he made an immense profit from his compositions with his creditors. As to the charge in the answer, respecting the inequalities in his compositions with his various creditors, that also is more than sustained in proof; for it appears, that whilst he was compounding with the mass of his creditors at various rates, from forty to eighty-seven cents in the dollar, according as he could work upon their fears of still heavier losses from his insolvency; he actually paid particular individuals, whom he found more sagacious and firm than the others, the whole amount of their claims, after unavailing attempts to beat them down to a composition.

Pending this suit, Clagett & Washington recovered judgments at law against him on his three notes passed to them by defendants, amounting, with interest and costs, to $1083.55; all of which judgments he fully satisfied, before the final decree passed in this cause. By that decree, the defendants are decreed to refund to the complainant the amount so paid by him to Clagett & Washington, with interest on the same from the date of the decree; and, without delay, to bring into court the remaining twenty-three of said notes, to be cancelled; which notes are declared by the decree to be for ever null and void, &c.

The counsel for the appellants cited 2 Atk. 566; 2 Story's Equity, § 18; 1 Vern. 47, 210; 2 Com. on Cont. 380; 1 Str. 425; 1 Bro. C. C. 167; 1 Story's Equity, § 250; 1 Pick. 340; Dick. 411; 1 Chan. Cas. 103.

Marbury and *Jones*, the counsel for the appellee, contended:—1. That the contract between the complainant and defendant of the 30th December 1833, was truly stated in the bill; and had been fully complied with on the part of the complainant. 2. That the said contract was made at the instance and by the request of the appellants, without solicitation on the part of complainant; and without any fraud or imposition practised by him on the defendants to induce them to enter into the same. 3. That the relief prayed for by the complainant below, was within the jurisdiction of a court of equity.

The counsel for the appellee denied all fraud in the transactions between him and the appellants. While the appellee substantially *and effectually complied with his agreement, the appellants have altogether [*187 failed on their part. The misfortunes of the appellee obliged him to make the compromises effected with his creditors; and that which was entered into with the appellants was made in good faith, and was so executed by him. The agreement made with the appellants was that stated in the bill; and the appellants did not prove in the circuit court any other agreement. Many of the allegations in the answers are not supported by proof; and they are, therefore, to have no weight with the court in their consideration of the case.

A court of chancery has jurisdiction to direct the delivery of notes or bonds or deeds, which a party cannot, in conscience, withhold. 1 Johns. Ch. 517 ; 2 Story's Equity, § 11.

The settlement of the real estate was open and notorious. The deed was put upon the public records. The compromise made with the appellants had no connection with arrangements made with other creditors ; and is not to be affected by them. The principles of law which render a composition with creditors void, on the ground of inequality or concealment, do not apply to such a case as this. Where a general campromise is made, apparently equal, but some of the creditors have been induced to assent to it by a private, and more beneficial agreement, it will be void. But such is not the case before the court. Cases cited in the argument : 5 East 230 ; 5 Johns. 291 ; 12 Price 183.

Catron, Justice, delivered the opinion of the court :—The appellants contend the decree should be reversed, and the bill dismissed, upon various propositions of law and fact.

1. It is insisted : " The complainant has laid no ground in his bill for equitable relief ; neither the agreement itself, as alleged in the bill, nor any of the collateral circumstances, being of a nature to call for a specific performance in equity." The doctrine of specific performance has reference, ordinarily, to executory agreements for the coveyance of lands, and is rarely applied to contracts affecting personal property. 2 Story's Eq. § 26, 36. Nor is relief sought by the complainant on this head of jurisdiction. To incumber the case made by the pleadings with doctrines foreign to the subject-matter litigated, would tend to confound principles in their nature dissimilar and separate. The relief prayed, is the delivery to ths complainant of instruments to which he is entitled. 2 Story's Eq. § 12. Not the execu-
*188] tion of an executory contract, *further than to decree the amount he has been compelled to pay to Clagett & Washington ; which is an incident to the exercise of jurisdiction that coerces the delivery of the instruments. So material a part of the transaction being clearly within the jurisdiction of the court, it will, of course, end the cause ; without sending the parties to law as to part, having granted relief for part.

2. It is assumed : " But whatever the terms, or the nature of the composition, and however fit it may be, in its own nature, for specific performance in equity, the whole of the complainant's equity is repelled by a countervailing equity in defendants ; from his promise, as one of their concomitant inducements to the composition, to pay the full amount of the debt, when able to do so ; and from the fact, both averred and proved, that he was able to pay the whole debt." Did the complainant, White, promise to pay the full amount of the debt, when he was able to do so ; and by this means, induce the respondents to make a composition then to receive seventy cents in the dollar, as partial payment ? If this was the contract, and the complainant was able to pay the full amount, at the time, he was immediately bound for the thirty cents in the dollar in addition ; and the respondents are entitled either to have the bill dismissed, so that they may enforce the contract at law, for the balance due ; or they must have administered to them in equity the same relief, by a decree for the thirty per cent. ; founded on the familar rule, that he who seeks equity, must, as a condition, do equity

to the respondents, before the relief can be granted. We must, therefore, inquire what the contract was.

The bill, in substance, alleges, that the aggregate amount secured by the notes prayed to be surrendered, was $7141.42 ; that the notes were not due, when the composition was made ; that the parties entered into an agreement to anticipate the period of credit on them, by which White undertook to deliver to Clarke & Briscoe, and they agreed to receive of White, goods and merchandise, in full payment of the sum due, at the rate of seventy cents in the dollar, estimating the goods then in White's store, at the prices marked on them as cost prices ; that the goods were delivered in discharge of the debt ; and the notes, as evidences of it, were to be surrendered to White, on the delivery of the goods.

To this specific allegation, it is answered : " These defendants deny that they did make the agreement with complainant respecting the compromise of their claim against the complainant ; and the *cancelling of said notes on the terms, and upon the conditions, set forth in said bill ; [*189 but they admit and aver, that about the time mentioned in the said bill, in consequence of hearing the complainant had failed in business, and was compromising with his creditors, a conversation and arrangement did take place between the defendant, Clarke, and the complainant ; in which said defendant asked him, upon what terms the complainant would settle the whole claim of the defendants, not merely on what terms he would settle the amount of said notes ; upon which complainant offered to settle it at sixty cents in the dollar, and pay in goods. Said defendant, Clarke, answered, that he understood complainant had compromised with other of his creditors at seventy cents in the dollar, and hoped complainant would not think of putting off the defendant with less ; and complainant, at length, agreed to pay defendants, in goods, the whole amount of their claim, at the rate of seventy cents in the dollar, and pay the balance, viz., thirty per cent., when he was able ; but insisted, that they should take the goods in masses, without selection, as they lay upon the shelves ; which was finally agreed to by defendant, Clarke ; nor was it till after the arrangement had been so agreed on between themselves, that anything was said between them about the defendants' getting up and cancelling the complainant's notes ; but afterwards, they admit a conversation on that subject did ensue between defendant, Clarke, and the complainant, in which it was understood and arranged between them, that upon the settlement of the defendants' whole claim, by paying the same in goods, at the rate of seventy cents in the dollar, the defendants should get in and cancel said notes ; not upon the settlement, in that mode, of the amount of the notes merely ; such was not the understanding of the parties, at least, of either of these defendants ; but the true amount of their just claim against the complainant ; the amount understood by defendant, Clarke, at the time, was not the aggregate amount of the notes merely, but of the original invoice, in liquidation of the amount of which, with a deduction of five per cent., the notes had been given ; and inasmuch as that deduction had been allowed, upon the faith and confidence alone of the complainant's said pledge and assurance to pay the said notes, punctually, as aforesaid ; and as he had totally failed to comply with said pledge and assurance, these defendants considered that, in equity, indeed, in

strict justice, they were entitled to the amount of the invoice, without such deduction."

Whether the thirty per cent., in addition, is due to the appellants *by the contract, depends on the evidence: the answer admits the agreement of composition to be truly set out in the bill, so far as it is set forth; but insists, that so much of it as stipulated for the full payment of the notes when the complainant was able, is omitted. The rule in such case is, "If the answer of the defendant admits a fact, but insists on matter by way of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance." Dyer 108. The defendants adduced no evidence, tending in the slighest degree to establish the statement in the answer. The complainant, however, proceeded to prove the contract by different witnesses, to be such (and no other) as the bill alleges it to have been. We give extracts from the depositions of two of his witnesses.

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"Do you, or do you not, remember a compromise made between the complainant and the defendants, Clarke & Briscoe, relative to the payment of a certain debt due from the said complainant to the said defendants? If yea, state the subject of the said compromise, and the terms of it."

"To the second.—I do. The claim was for the original purchase made of Clarke & Briscoe, by complainant, in 1832; and the agreement was to pay the notes given for that purchase, by giving them goods at seventy cents in the dollar, at the prices which they were market as having cost. Mr. Clarke made the agreement. He was to commence at any part of the store he chose, and take the goods as they came, till his claim was satisfied. Some of the notes had been passed away by Clarke & Briscoe. These they were to take up, and return with the other notes, to Mr. White, as soon after the goods were delivered as he could get them. There were no engagements, so far as I know, to pay the balance of thirty per cent. at any time. I was present when the bargain was made. They took the goods upon those terms, to the full amount of their claim, except one dollar and forty-one cents."

"To the second.—I recollect Mr. Clarke's coming into Mr. White's store, and wishing to know in what way they would settle. The result of their conversation was, that Mr. White should give him seventy cents in the dollar, in goods, for the amount of his claim. The claim was for the balance due to Clarke & Briscoe, for the purchase of a stock of goods made of them by Mr. White, in 1832. The terms of the compromise were, that Mr. Clarke should commence at any part of the store where he chose, and go on taking *all the goods as they came, till he got the full amount of his claim, at seventy cents in the dollar, at the price which the goods were marked to have cost. Mr. Clarke was to deliver up to Mr. White the notes which remained unpaid for the purchase in 1832."

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The assumption, therefore, that the complainant's equity is repelled by the countervailing equity of the defendants, because of the promise to pay the full amount of the debt when complainant was able, cannot be sustained.

It is, 3 and 4, assumed, that "a composition of a failing trader with his creditor, being *strictissimi juris*, must be fulfilled by the debtor to the letter; and any failure in complying with its terms, in a minute particular, on

his part, however far he may go in part performance, vitiates and annuls the whole composition." "According to the complainant's own showing, he has failed to fulfil the composition *in terminis;* and he has, to this day, something further to do, in order to fulfil it; yet he has not even been decreed to fulfil it."

It is generally true, in cases of composition, that the debtor who agrees to pay a less sum in discharge of a contract, must pay punctually; for, until performance, the creditor is not bound. The reason is obvious; the creditor has the sole right of modifying the first contract, and of prescribing the conditions of its discharge; if the agreement for composition stipulates for partial payment, and the debtor fails to pay, the condition to take part is broken, the second contract forfeited, and no bar to the original cause of action. 16 Ves. 374.

It will be necessary to examine whether any question is raised to which the principle can be applied. We have seen, there is no evidence sustaining the claim for thirty per cent. on the $7141.42, adjusted by the composition; but it is also insisted by the answer, that if White failed to pay punctually for the goods purchased from C. & B. in 1832, he then contracted to pay five per cent. in addition on the invoice in liquidation of which the notes were given. The averment is, independent of any allegation in the bill, very improbable in itself, and not sustained by the slightest proof. We take it, therefore, no such agreement was made.

At the time the goods were delivered, through inadvertence, $1.41 remained due to Clarke & Briscoe. When White discovered it, he offered to pay the amount, which the respondents *refused to receive. The fact is set forth in the bill, but not noticed in the answer. If, however, [*192 an issue had been taken upon it, we think the mistake of a character too trivial to deserve notice; the defendants disregarded it when the goods were in a course of delivery, and admitted the contract of composition to the amount of seventy cents in the dollar, to be discharged; and so this court holds. White's compliance will, therefore, bear the test of all the legal strictness, supposed in argument to apply in cases of performing contracts of composition.

5 and 6. It is insisted: "There is no evidence in the cause competent and sufficient to overrule so much of the answer as denies the agreement for composition, alleged in the bill; and avers a materially different agreement." "Taking the terms of the composition to be such as the answer avers and puts in the place of what it denies, there appears a still more important, palpable and fatal breach of its terms on the part of complainant." We reply, that the evidence is competent, and amply sufficient to overrule the parts of the answer responsive to the bill; and that the terms of the composition were not such as the answer avers.

7. It is insisted: "The actual frauds which the answer charges, in the elaboration of the scheme of the artificial and feigned failure and insolvency, for defrauding the creditors of their dues, and overreaching them with unfair compositions, under deceitful pretexts, are fully made out in proof; and are sufficient, and more than sufficient, to set aside the complainant's composition with the defendants, and every composition with his other creditors." This being the ground upon which most reliance was placed to make out the defence, it is due to the argument, that we examine the point

in the form it has been presented for the appellants; and consequently, that some attention be bestowed on the evidence tending to prove fraudulent conduct in the appellee, without nicely discriminating how far it applies to the cause made by the pleadings. It is contended, that the correspondence, the attempts at composition with the Baltimore merchants, and the agreements with them and others, furnish evidence of a fraudulent intent in the appellee, to alarm and overreach his creditors, generally, thereby to draw them into compositions *at low rates, by deceitful pretexts; which *193] position, it is assumed, is fully made out in proof; and that the appellants were victims to the common fraud and subterfuge is a fair inference; at all events, if actual fraud does not appear, that it is evident, the complainant did not come into court with an unaffected conscience; in which case, he cannot call upon the active power of the court for relief; that, in the phrase of early times, the complainant must come into equity with clean hands.

If any deception was practised, whereby the appellants were drawn into a losing bargain, and a sacrifice of thirty per cent. of their just demand, the court could not, consistently with the principle referred to, afford its active aid to the complainant. But if it be assumed, that a court of equity can refuse relief, because the complainant, in settling with other creditors, imposed on them, and hence his conscience is affected, the assumption must be rejected as unsound. Such extraneous dealings are not within the issue, and do not belong to the cause, further than they can be connected with the transaction, as evidence of a connected system of fraud, to produce alarm and action on the part of these particular creditors. To press further the principle, that a complainant must come into a court of equity, when he asks its aid, with a clear conscience, would be assuming an unlimited and undefined discretion to dismiss the bill, not for want of equity in the allegations and corresponding proof, but because of the bad conduct in life and character of the complainant.

The true rule is, "If the person against whom fraud is alleged, should be proved to have been guilty of it in any number of instances; still, if the particular act sought to be avoided, be not shown to be tainted with fraud, it cannot be affected by those other frauds; unless in some way or other it be connected with or form a part of them." *Conard* v. *Nicoll*, 4 Pet. 297. Testing the force and effect of the evidence, with this explanation of the rule, in virtue of which it is sought to give it effect; and what does it establish? For years before the fall of 1833, when the transactions we are investigating took place, the complainant, White, had been a retail dry-goods merchant, in Washington city, of reputed opulence, and decidedly good credit. In 1833, the city business was depressed, and the sales reduced, compared with former years; the retailers generally bought light stocks for the fall trade, predicting pressure in the money market, and difficult times. White, on the contrary, purchased much larger than usual, asserting it as his opinion, *that trade would assume its usual vigor, and that the *194] ordinary quantity of goods would be needed during the then approaching long session of congress; his fall purchases amounted to near $34,000, and added to those of the spring, made $47,857. In the previous year (1832) he had purchased $33,892 worth of goods for his stores; having one in Georgetown also. It is insisted, that these large purchases were made with

a prospective view to a failure, and compositions at thirty and fifty per cent. discount; the complainant at the same time being perfectly solvent in fact. That purchasing largely, was an elaborated scheme, with a view to future and feigned insolvency, designed, on the part of White, to overreach his creditors, it is difficult to believe. His exertions to maintain his credit, after his first notes were dishonored, and to quiet the Baltimore creditors, whose suspicions had been awakened from his heavy purchases in September, could not well have been more earnest, active or ingenuous; and this, up to the time when the Baltimore creditors, by a bill of injunction, restrained complainant from proceeding in his business; and which prostrated his credit and character to such a degree as to render a failure inevitable, had the means of payment been ample as they are asserted to have been.

It is probable, that the appellant was insolvent, and knew the fact to be so, when he made the fall purchases of 1833; and that he incurred the dangerous risk of so large an overtrading, in the hope that chance and a desperate effort might save him; that if he must fail, it would not be material for what amount he failed, if he had the goods on hand, or their proceeds, should they be sold when the event happened. This certainly was bad faith, if true, in reference to the creditors from whom the stock of goods, for 1833, had been purchased; but how it could affect the respondents, who had the previous year trusted White, on long credits, cannot be perceived; they received payment out of the goods thus obtained, to the amount of seventy per cent.; and in this aspect of the alleged fraud by complainant on the wholesale dealers, the appellants surely have no just grounds to complain.

But the merits of the defence, it is earnestly urged, rest on the question whether the appellee was solvent and able to pay his whole debts, at the date of the composition and contract to take a part. On this head, the evidence is tolerably satisfactory; an account of White's *means and liabilities was demanded of him by the Baltimore creditors, as early [*195 as the 3d of December 1833, which was furnished, and is no doubt substantially correct; at least, so the creditors treated it, and nothing is found in the record to disprove the statement. That he owed the debts there set forth, is certain; and that he had the means to meet them, is very improbable, as the creditors instituted and exercised a scrutiny not likely to overlook secreted property; and money, there can be no doubt, there was none; for the complainant, in good faith, seems to have discharged many of his bank debts, with others, to the extent of all the cash he could command, amounting to $12,000, during the months of October and November 1833.

This brings us to the debts and means of payment. On the 3d of December, the complainant owed in Baltimore $15,155; in Philadelphia, $14,416; in New York, $10,764; and in Washington city, $9251; in all, $49,586. The means of payment were the stocks of goods in Washington and Georgetown, $26,500; good debts, $2446; doubtful debts, $2533: the aggregate of active means, $31,449. Real estate, $4000; household furniture, $1750; these items, added to the goods and debts, make $37,229 worth of property. Then there were exhibited bad debts, due to the complainant, amount, $10,165. On these desperate debts, no business man could place any reliance; and they are, therefore, disregarded by the court when estimating the available property of the appellee; and the same might, with something of safety, be assumed of the item consisting of household goods; the idea that the wealthy

wholesale dealer will strip the family of his unfortunate retail customer, of their beds, furniture and utensils, has no place in the mercantile transactions of this country. Retaining this item, however, and the complainant had twenty-five per cent. less property than the amount of the demands against him; and of course, could not have paid more than seventy-five per cent.
*196] The fourth of *$49,586 (the aggregate of the debts) is $12,396; the property in hand ($37,229) deducted from the indebtment, shows an excess of debts over means of $12,357.

This state of facts had been exposed to the creditors of the appellee, on the 3d of December; and Clarke & Briscoe applied for an adjustment, on the 29th of the month; of course, they were familiar with it; they made no inquiry for information, and no demand for more than seventy per cent. The notes of appellants were not due, and they were obviously and very justly impressed with the belief, that the debt would be lost, if White did not compound it; he was urged by them to deliver goods to cover seventy per cent.; this he, at first, declined and offered sixty; but on being reminded that others had received payment at the rate of seventy per cent., he, with obvious reluctance, assented. But more than seventy per cent. was received by Clarke & Briscoe, because their notes were not then due. They pressed the debtor to the highest rate of composition he was able to pay, consistently with his duty to the other creditors; and considering the nature of his means, and that he discharged this demand with the most available means, it was probable, that equal justice could not be done to others. These prominent and controlling facts repel the idea of a feigned insolvency; or that the appellants were overreached by deceitful devices.

The evidence tending to prove unfair conduct on the part of the appellee, in reference to his creditors in Baltimore, &c., had little influence on the appellants, as we apprehend; how far it extended, it is difficult to ascertain. Be this, however, as it may, they having received their full proportion of the appellee's property, have no right to resist the prayer for relief, even had the composition been made in subservience to an unfair but extraneous influence, growing out of the transactions with the other creditors, who were separately seeking payment. In equity, as at law, fraud and injury must concur, to furnish ground for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognisance. Truly, there are strong grounds of suspicion; but fraud ought to be conceived; it must be proved, and expressly found. *Conard* v. *Nicoll*, 4 Pet. 297; *United States* v. *Arredondo*, 6 Ibid. 716.

*197] *Again, it is contended, that the appellants did not receive their due proportion of the means of payment at the appellee's command, when the composition was made; because he held a lot with valuable improvements thereon, in Washington city, in the name of his brother, by a conveyance purporting to be in trust for appellee's three infant children; which deed, it is insisted, is pretended, covinous and void, both in law and fact, in so far as it affects the appellants and other creditors; that being thus void, it furnishes almost conclusive evidence of an intended fictitious failure, at the time the goods were purchased from the appellants, in 1832, and for which the notes sought to be injoined were given. Much stress has been laid upon this transaction, as somewhat of an independent ground of defence in the pleadings, and also in the arguments presented for the appel-

lants ; we, therefore, deem it a duty to bestow upon this particular question, a corresponding degree of attention.

The facts it rests upon appear by the trust deed, and the deposition of the grantor, John A. Smith. The lot was formerly the property of Daniel Brent, and was sold, early in 1829, as part of his property, by John A. Smith, appointed trustee of Brent's estate, under an insolvent act ; at which sale, William G. W. White became the purchaser, at the price of $1532.34, on a credit of one, two and three years ; the lot being sold at auction for a full price, and the sale notes paid at maturity, no doubt exists of the appellee's former equity therein. He took possession, immediately after the purchase in 1829, and commenced improving, by erecting buildings thereon ; the lot having been vacant at the date of the purchase. On the 14th of January 1832, John A. Smith, at the request of William G. W. White, conveyed the premises to James L. White, in trust for the three infant children of William G. W. White, in fee. Between the date of the purchase in 1829, and that of the conveyance in January 1832, William G. W. White made improvements on the premises to the value of about $3000; and added to them others, costing $1200 or $1500, after the date of the deed, and before his failure in December 1833. The property, at this date, was worth about $6000.

Another attendant circumstance is strongly relied on, to show the fraudulent intent of the appellee. The deed of the 14th of January of *1832, was not delivered to the clerk to be recorded until the 13th day [*198 of July thereafter, and within one day of the expiration of the time prescribed for such delivery, by the statute of Maryland, which is six months ; and the notes sought to be surrendered, are dated the 2d of July 1832. In reference to this conveyance, it may be remarked, that by the common law, it was valid without registration ; and where registry acts require deeds to be recorded, they are valid, until the time prescribed by the statute has expired ; and if recorded within the time, are as effectual from the date of execution, as if no registry act existed. The deed from Smith to James L. White is, therefore, unimpeachable, for the reason that it was delivered for registration on the last day of the six months ; nor is fraud predicable of the mere circumstance of non-registry, as against William G. W. White, who was not the grantee, nor entitled to the possession of the deed. How far fraud in fact might be inferred, from not putting the deed of record, taken in connection with other circumstances, is a question involving the rights of third persons not before the court ; and which we do not take into consideration, further than to ascertain whether the appellee used the deed as a means of deception, in the transaction before us. If White represented the property as not belonging to him, and settled with his creditors, on this basis, when it did belong to him ; the question then is, can the appellants reverse the decree, and dismiss the bill, and be let in at law upon the property ? and this presents another aspect of the effect of the conveyance.

As a legal title, it is not open to imputation ; William G. W. White never had any estate in the premises, recognised at law, or subject to execution ; the title passed directly from Smith to James L. White ; consequently, if the deed were pronounced void, the title would be adjudged in Smith ; it is one of those conveyances, where there was clearly a *bonâ fide* grantor, and which is not within the statutes against fraudulent conveyan-

ces; as was holden in *McNeills* v. *Brooks*, in 1 Yerg. 73; which case followed that of *Crisp* v. *Pratt*, in Cro. Car. 549. If the conveyance is open to imputation, it is so at common law, and because of fraud in fact; and involves substantially the same inquiries that did the case, in this court, of *Sexton* v. *Wheaton*, 8 Wheat. 229; and *Hinde's Lessee* v. *Longworth*, 11 Ibid. 199. We will not say, but that on a proper case being made, and fraud in fact proved to have been the moving cause of ordering to be vested in trust the premises, in the name of the appellee's brother, that the *latter would not be decreed to hold as trustee for the creditors of William G. W. White, he having paid the consideration; but then the property would be treated and applied as a trust fund, and be so declared in equity, on the sole ground that the transaction was fraudulent in fact. No case is before us fairly to raise such a question, or to justify speculations affecting injuriously a title valid at law, and *primâ facie* good in equity, when those most interested in it are not before the court.

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There is another reason why the appellants cannot challenge the validity of the title made by Smith to James L. White; it is this: they made the composition with a full and perfect knowledge of the facts attending the conveyance, and subsequent improvements of the property; then they continued silent, and took the full benefit of their contract, and cannot now be heard to speak. He who purchases unsound property, with knowledge of the unsoundness at the time, cannot maintain an action. So, if one compounds a debt, or makes any other contract, with a full knowledge of all the facts, acting at arm's length, upon his judgment, and fails to guard against loss; he must abide the consequences. Neither fraud nor mistake can be imputed to such an agreement.

8. It is contended, the inequality alone in his various compositions with his creditors (all the other circumstances of fraud being out of the question), is a fraud, *per se*, both at law and equity; and sufficient of itself either at law or equity, to vitiate and set aside each and every of the compositions, from the lowest to the highest. If, upon failure of insolvency, one creditor goes into a contract of general composition, common to the others, at the same time having an underhand agreement with the debtor to receive a larger per cent., such agreement is fraudulent and void; and cannot be enforced against the debtor or any surety to it. 1 Story 371. The doctrine was carried so far in the court of exchequer in England, some years since, as to extend the principle to a case where the creditors made separate contracts with the debtors, but with an understanding that two shillings and six-pence in the pound was to be paid; and one of the creditors got a secret bond, fraudulently intending to induce others to enter into the composition, and the bond was relieved against. *Fawcett* v. *Gee*, 3 Anstr. 910. Although this case, and *Spooner* v. *Whitsan*, 8 Moore 580, in the common pleas, have been adduced to the court, as varying the general principle, on examination of *them, we think they proceed upon it; and the case in Anstruther presses the principle very far against the creditor: however that might be, no great stress could be laid on them by the court; and the same may be said of *Small* v. *Brackley*, 2 Vern. 602, cited by the appellant's counsel.

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The rule cutting off underhand agreements in cases of joint and general compositions, as a fraud upon the other compounding creditors, and because

such agreements are subversive of sound morals and public policy, has no application to a case like the present; where each creditor acts not only for himself, but in opposition to every other creditor, all equally relying upon their vigilance to gain a priority; which, if obtained, each being entitled to have satisfaction, the payment cannot be questioned. The debtor may prefer one creditor, pay him fully, and exhaust his whole property, leaving nothing for others equally meritorious. Yet their case is not remedial; and why may not debts be partially paid in unequal amounts? If those who receive partial payments are willing to give releases, it is their own matter, and should a third person interfere, debtor and creditor could well say to him, you are a stranger, and must stand aside. The case of the appellee presented a fair instance of the propriety of paying some of his debts fully, and others partially. He owed bank debts, secured by the indorsements of friends, whose kindness was the only motive to incur the liability; to relieve whom, he did pay, and ought to have paid, large sums, during October and November 1833. The notes passed off to Clagett & Washington were transferred before maturity, and before the contract of composition took place; and of course, their right was not affected by it. As to them, the decree dismissing the bill was proper; as it is in all other respects, and must be affirmed.

BALDWIN, Justice, dissented.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*BEULAH STELLE, Plaintiff in error, *v.* DANIEL CARROLL of [*201
DUDDINGTON, Defendant in error.

Dower.

The doctrines of the common law, on the subject of dower, although since altered by an act of assembly of Maryland, were still the law of Maryland, when the United States assumed jurisdiction over the district of Columbia; and the act of congress of February 27th, 1801, which provides for its government, declares that the laws of Maryland, as they then existed, should continue and be in force in that part of the district which was ceded by that state.

According to the principles of the common law, a widow was not dowable in her husband's equity of redemption; and if a man mortgages in fee, before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower.[1]

Mortgages were made during the coverture, but the mortgage deeds were acknowledged by the wife, upon privy examination; and these acknowledgments, under the acts of assembly of Maryland, of 1715, ch. 47, and 1766, ch. 14, bar the right of dower in the lots thus conveyed to the mortgagee. The legal state passed to the mortgagee, and the husband retained nothing but the equity of redemption; and as the wife had no right of dower in this equitable interest, a subsequent deed, executed by the husband, conveyed the whole of his interest in the estate, and was a bar to the claim of dower; it was not necessary for the wife to join in such a deed, as she had no right of dower in the equity of redemption, which was conveyed by the deed.

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[1] And see Mayburry *v.* Brien, 15 Pet. 21.

Stelle v. Carroll.

ERROR to the Circuit Court of the District of Columbia, and county of Washington. The plaintiff in error brought an action claiming to be endowed out of certain lots, with the improvements on them, being No. 16 and No. 17, in square 728, in the city of Washington; and relied on the following circumstances, as giving her the right thereto.

On the 24th of August 1804, George Walker and William Turnicliffe conveyed in fee-simple to Pontius D. Stelle, lots 16 and 17, in square 728, in the city of Washington. And on the 25th of August 1804, Pontius D. Stelle reconveyed these lots to William Turnicliffe, by way of mortgage, to secure the payment of the purchase-money; but his wife did not relinquish her dower. On the 14th day of November 1808, Pontius D. Stelle executed to Peter Miller another deed of bargain and sale, in fee-simple, of lot 18, in square 728; and Beulah Stelle, his wife, joined with him in the acknowledgment, and relinquished her dower. On the first day of March 1810, Pontius
*202] D. Stelle conveyed the *same lots to Peter Miller, in fee-simple, by way of mortgage, and Beulah Stelle, the demandant, relinquished her dower in them. On the 28th of January 1811, Pontius D. Stelle executed another deed, in fee-simple, to Peter Miller; by which, after reciting that he had, on the 25th of August 1804, mortgaged lots 16 and 17 to William Turnicliffe, to secure the payment of $4000, the balance of which had been, or was, secured to be paid to Turnicliffe by Miller, "and from which the said Pontius D. Stelle is wholly released and exonerated;" that Miller had advanced to him (Stelle) several large sums of money, for securing the payment of which he (Stelle) had conveyed to Miller, lot 18, in square 728, with a deed of defeasance from Miller to Stelle; which sums of money, "Stelle having failed to pay to the said Milles, the said conveyance of lot No. 18 to the said Miller hath become absolute and unconditional;" and that Stelle was desirous of "more fully conveying and assuring the above-described lots of ground to the said Peter Miller;" and for the consideration of $892.98, he proceeds to convey, by bargain and sale, to the said Peter Miller, his heirs and assigns, the said lots 16, 17 and 18, "and all the right, title, interest, property, claim and demand, whether in law or equity," which he had in them; with covenants of general warranty ("except the liens above mentioned"), and for further assurance. This deed had no release of dower. Afterwards, Pontius D. Stelle left the possession of the said lots and they were sold under a decree of the court of chancery of Washington, by Zachariah Walker, trustee, and were purchased by the defendant, and the buildings on lot 16 were erected, after the deed to Peter Miller, in 1811; and not by P. D. Stelle.

The circuit court instructed the jury, the plaintiff could not recover, and a verdict and judgment were rendered for the defendant, who thereupon prosecuted this writ of error.

This case was argued by the Messrs. *Brent*, for the plaintiff; and by *Bradley* and *Coxe*, for the defendant.

The *plaintiff's* counsel relied on the following points for reversing the judgment. 1. The defendant, claiming under the deed of 1811, from P. D. Stelle to Peter Miller, could not deny the seisin by P. D. Stelle, of the
*203] premises in question, at that date. *2. That the mortgage to Turnicliffe was no bar to the claim for dower, because the wife did

not join in it, and because the deed of 1811, from Stelle to Miller, recites the satisfaction of this mortgage. 3. That the two mortgages from Stelle and wife to Peter Miller, were absolutely satisfied and discharged, by the sale of the equity of redemption, in 1811, to Peter Miller, by said Stelle. 4. That, admitting the existence of outstanding mortgages, in which the demandant had joined, still such mortgages are no bar to this demand; because the said defendant does not hold under said mortgages, or any of them, but alone under the deed of 1811. 5. That, where the tenant in possession has not entered under existing mortgages, the fact of there being such outstanding mortgages, is no bar to dower. 6. That the demandant did not duly and legally relinquish her dower by any deed, as alleged.

For the plaintiff, the following cases were cited: 6 Johns. 290; 7 Ibid. 281; 9 Ibid. 344; 13 Mass. 228; 4 Kent's Com. 44–5; 2 Halst. 408; 5 Pick. 416, 475; 3 Wheat. 226–7; 17 Mass. 564; 15 Ibid. 278; 1 Cow. 460.

The counsel for the *defendant* in error contended:—1. That Pontius D. Stelle never had an estate in lots 16 and 17, of which the demandant could be endowed. 2. That if he had such estate, yet she had relinquished her dower, by the deed of the 1st of March 1810; and if any equity remained in her (which the defendant denied), it was released by the deed of her husband of the 28th of January 1811. Cases cited, 1 Atk. 441–2; 6 Johns. 294; 7 Greenl. 42, &c.

Taney, Ch. J., delivered the opinion of the court.—This is an action of dower, and was brought by the plaintiff in error against the defendant, in the circuit court for Washington county, in the district of Columbia, to recover her dower in lots No. 16, 17, 18 and 19, in square 728, in the city of Washington. At the trial of the case, the circuit court instructed the jury, that the demandant was not entitled to recover; to which instruction, an exception was taken; and the verdict and judgment being for the defendant, the case has been brought here by the demandant, by writ of error.

*The claim for dower in lot No. 19, seems to have been abandoned, as no evidence in relation to it is contained in the record. As respects [*204 the other three lots, it appears, that Pontius D. Stelle was seised of them in fee, during the coverture of the demandant; and being so seised, by deeds duly executed and recorded, mortgaged them in fee to a certain Peter Miller. The deeds were acknowledged by the demandant, on privy examination, according to the act of assembly of Maryland; which was in force when congress assumed jurisdiction over the district of Columbia. Lots No. 16 and 17 had been incumbered by Stelle, by a previous mortgage, to a certain William Turnicliffe; and after these several mortgages had been made, Stelle executed a deed to Miller, dated January 28th, 1811, duly acknowledged and recorded; in which, after reciting that he had mortgaged lots No. 16 and 17, to Turnicliffe, to secure the payment of $4000, the balance of which had been paid by Miller, and from which the said Stelle was wholly released and exonerated; and reciting also, that Miller had advanced to Stelle several large sums of money, to secure which, Stelle had conveyed to him lot No. 18, with a deed of defeasance from Miller to Stelle; which sums of money the said Stelle having failed to pay, the conveyance of this lot had became absolute and unconditional; and that the said Stelle was

desirous of more fully conveying and assuring these lots to Miller, he, the said Stelle, in consideration of the premises, and for and in consideration of the sum of $892.98, paid him by the said Miller, the receipt of which he thereby acknowledged, did "give, grant, bargain, sell, alien, release and confirm" these three lots, to the said Peter Miller, his heirs and assigns. The deed contained a covenant of general warranty, "excepting the liens before mentioned." The demandant did not join in, nor acknowledge, this deed. Stelle died in 1828; and was out of possession of these lots, for some time before his death. The defendant, Carroll, claims under Peter Miller.

The case has been fully argued, and many decisions in different state courts have been cited and relied on, in the argument. It is, however, unnecessary to review and compare them; because the question must depend on the laws of Maryland, as they stood at the time that congress assumed jurisdiction over the district of Columbia; and the decisions referred to in the argument, although made by tribunals entitled to high respect, yet cannot
*205] be received as evidence *of the law, in the case before us; since it is well known, that in the states where these decisions have been made, the rules of the common law, in relation to dower, have been modified by a course of judicial decision; and the strictness of the rule which excluded the widow from dower in an equitable interest, has been, in some degree, relaxed. But the doctrines of the common law upon this subject (although since altered by act of assembly) were still the law of Maryland, when the United States assumed jurisdiction over this district; and the act of congress of February 27th, 1801, which provides for its government, declares that the laws of Maryland, as they then existed, should continue and be in force in that part of the district which was ceded by that state.

It is not necessary to refer to adjudged cases, for the purpose of proving that, according to the principles of the common law, a widow is not dowable in her husband's equity of redemption; and if a man mortgages in fee, before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower. In this case, the mortgages were made during the coverture; but the mortgage deeds were acknowledged by the wife, upon privy examinations; and these acknowledgments, under the acts of assembly of Maryland, of 1715, ch. 47, and 1766, ch. 14, which are in force in this district, debarred her of the right of dower in the lots thus conveyed to the mortgagee. The legal estate passed to the mortgagee, and the husband retained nothing but the equity of redemption; and as his wife had no right of dower in this equitable interest, the deed of Stelle to Miller, of January 28th, 1811, above mentioned, conveyed to Miller the whole interest which had remained in Stelle. It was unnecessary for the wife to join in, or to acknowledge, this deed; for as she had no right of dower in the equity of redemption, she had no interest to relinquish, when her husband conveyed it to Miller.

The recitals hereinbefore mentioned, in the deed of January 28th, 1811, have been much relied on, in the argument for the plaintiff in error; and it is insisted, that, according to the facts there stated, the mortgage to Turnicliffe had been paid off by Miller; and that, as it does not appear in the record, that it had been assigned to Miller, the payments made by him, as recited in the deed above mentioned, were a satisfaction of the mortgage,

and restored to Stelle the legal estate; and consequently, revived the right of dower in his wife, in lots No. 16 and 17, which had been mortgaged to Turnicliffe. But it must be remembered, that Miller held a mortgage to himself *for these lots, junior to that of Turnicliffe; and that the payments made by him, to discharge a prior incumbrance, would not [*206 inure to the benefit of Stelle; but that Miller had a right to hold on to the legal estate conveyed to him by his mortgage-deed, to secure the payments he had made to Turnicliffe; and Stelle was not entitled to be restored to his legal estate in these lands, until the payments to Turnicliffe were satisfied, as well as the money due to Miller on the mortgage to himself. Besides, if these payments to Miller could be regarded as an extinguishment of the incumbrance created by the mortgage to Turnicliffe, yet the mortgage of the same lots to Miller was outstanding and unsatisfied. The interest of Stelle, therefore, even in that case, could be nothing more than an equity of redemption; and the satisfaction of Turnicliffe's mortgage by Stelle himself, would not have restored to the demandant the right of dower, of which she had debarred herself, by acknowledging the deeds to Miller, hereinbefore mentioned. The conveyance of the equity of redemption to Miller, for a valuable consideration, united in him the entire legal and equitable interests; and this conveyance cannot, upon any principle of law or justice, give a right of dower in these lots to the wife of Stelle.

We think the instruction given by the circuit court was right; and the judgment must, therefore, be affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Adams, Cunningham & Company *v.* Calvin Jones. [*207

Certificate of division.—Guarantee.

Where a case is certified from a circuit court of the United States, the judges of the circuit court having differed in opinion upon questions of law which arose on the trial of the cause, the supreme court cannot be called upon the express an opinion on the whole facts of the case; instead of upon particular points of law, growing out of the case.

Upon a letter of guaranty, addressed to a particular person, or to persons generally, for a future credit to be given to a party in whose favor the guarantee is drawn, to charge the guarantor, notice is necessarily to be given to him, that the person giving the credit has accepted or acted upon the guarantee, and has given credit on the faith of it. This is not an open question in this court, after the decisions which have been made in Russell *v.* Clarke, 7 Cranch 69; Edmondston *v.* Drake, 5 Pet. 624; Douglass *v.* Reynolds, 7 Ibid. 113; and Lee *v.* Dick, 10 Ibid. 482.

Certificate of Division from the Circuit Court for the district of West Tennessee. The defendant, Calvin Jones, was attached by a writ of *capias ad respondendum*, issued on 22d May 1835, to answer Adams, Cunningham & Co.; they claiming from him the sum of $1525, for goods furnished to Miss Betsey Miller, under the following letter of guaranty:

"Mr. William A. Williams:

"Sir:—On this sheet you have the list of articles wanted for Miss Betsey Miller's millinery establishment, which you were so very good as to offer to purchase for her. I will be security for the payment, either to you, or the merchants in New York of whom you may purchase, and you may leave this in their hands, or otherwise, as may be proper. I hope, to your favor and view, will be added all possible favor by the merchants, to the young lady, in quality and prices of goods, as I have no doubt she merits as much, by her late knowledge of her business, industry and pure conduct and principles, as any whatever. CALVIN JONES."

Mr. Williams, the person named in the guarantee, purchased the articles, according to the list furnished, from the plaintiffs, who were *merchants of New York, on the 28th of October 1832. The goods were furnished on the faith of the guarantee, which was left with the plaintiffs. *208]

During the progress of the cause, and whilst the same was before the jury, it occurred as a question, "whether the plaintiffs were bound to give notice to the defendant, that they had accepted or acted upon the guarantee, and given credit on the faith of it." Upon which question, the opinions of the judges were opposed; whereupon, on motion of the plaintiffs, by their attorney, that the point on which the disagreement hath happened, may be stated, under the direction of the judges, and certified under the seal of the court, to the supreme court, to be finally decided; it was ordered, that a statement of the pleadings, and a statement of facts, which was made under the direction of the judges, be certified, according to the request of the plaintiffs, and the law in that case made and provided.

The case was submitted to the court, on printed arguments, by *Fogg*, for the plaintiffs; and *Yerger*, for the defendant.

Fogg, for the plaintiff.—The counsel for the plaintiff admits that the decisions of the supreme court have established, "that a party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed, means to give credit on the footing of it, or not;" and hence, notice that it is accepted and relied upon, must be given in a reasonable time, to charge him who makes the guarantee. This is undoubtedly the rule, when the contract of the guarantor is prospective, and intends to attach to future transactions. Until the other party assents to and accepts the guarantee, it is a mere proposition of one party, to which, if the other assents, he must give notice of the fact to the guarantor; so that he may regulate his course of conduct, and his exercise of vigilance, in regard to the party in whose favor it is given.

The contract sued upon in this case, does not fall within the foregoing principles. It was not a prospective promise to Adams, Cunningham & Co., intended to operate upon future transactions, and to protect credits extended to Miss Miller, after the period it came to their hands. William A. Williams, to whom the letter was addressed, was appointed the agent of Miss Miller, to purchase the *goods specified in the letter; and he was also the agent of Calvin Jones, the defendant, to deliver the letter of guaranty to any merchants of New York, from whom Williams might think proper to purchase the goods. The defendant says, "I will be security for *209]

the payment either to you, or the merchants in New York of whom you may purchase ; and you may leave this in their hands, or otherwise, as may be proper." The defendant had himself annexed to the letter, the list of articles required ; he knew the whole extent of his obligation. From the terms of the letter, Williams had no right to deliver, or the merchants to receive it, except to cover the actual purchases Williams might make. The delivery of the letter and purchase of the goods, were intended to be one transaction ; and the sale and delivery of the guarantee were dependent acts, of the same date. The parties so acted. The clerk of the plaintiffs proves, "that the letter was exhibited to them, to ascertain and decide, whether they would make the sale upon its credit, and being satisfied with the goodness and responsibility of Calvin Jones, they did sell and deliver to Elizabeth A. Miller, through her agent, Williams, the goods ordered by the letter ; and the said Williams did, pursuant thereto, at the time of such sale, leave the said guarantee or security with the said Adams, Cunningham & Co." What Calvin Jones did by his agent, was equivalent to his own act ; through Mr. Williams, Jones did know, at the moment the letter was delivered, and became operative in the hands of the plaintiffs, the nature and full extent of his liability. The letter of authority was then exhausted ; and no further credit to Miss Miller was authorized or intended by the parties. This contract, therefore does not fall within any of the rules laid down by the supreme court ; and no further notice to Jones was necessary, than that which was within the knowledge of his agent Williams.

The case of *Duval* v. *Trask*, 12 Mass. 154, is in point. The court there say, they do not consider the promise in the light of a conditional undertaking ; so as to require a demand of, or dilligence in the pursuit of, the original contractor. It was, of itself, an original undertaking, collateral to the promise of the vendee, as security ; but not liable to any contingencies, except that of gross negligence in securing the debt, by means of which the loss might be thrown upon the vendors. See also, the case of *Lawrason* v. *Mason*, 3 Cranch 492, and that of *De Wolf* v. *Rabaud*, 1 Pet. 490, 500 ; and also, 7 Cranch 69.

* *Yerger*, for the defendant.—The defendant Jones was sued, as a guarantor of the debt of Miss Miller, and the only question raised [*210 by the record is, whether he was entitled to reasonable notice from the plaintiffs, that his guarantee was accepted and acted on by them. That he was so entitled, is settled by a variety of adjudicated cases, particularly by the cases of *Douglass* v. *Reynolds*, 7 Pet. 113 ; *Edmondston* v. *Drake*, 5 Ibid. 629 ; *Lee* v. *Dick*, 10 Ibid. 482 ; 12 Pick. 133 ; 1 Bailey (S. C.) 620. This case cannot be distinguished, in principle, from the foregoing cases. One of the judges, however, in the court below, believed, from the terms of the guarantee, that Mr. Williams (the person authorized in the guarantee to purchase the goods) was the agent of the guarantor, and that in such case, no notice was necessary. This view of the case would make Jones the principal debtor, instead of Miss Miller ; Williams would, in such event, purchase the goods for Jones, and not on Miss Miller's account ; which is contrary to the manifest intention of the parties.

The guarantee, on its face, shows that Jones's liability was only colla-

teral. It shows also, that Williams was to be the agent of Miss Miller, in purchasing the goods. The guarantee is directed to Williams, and says, "On this sheet, you have the list of articles, &c., which you were so good as to offer to purchase for her. I will be security for the payment, either to you, or the merchants of whom you will purchase; and you may leave this in their hards, or otherwise, as you may think proper," &c. Does not the language conclusively prove, that Williams was Miss Miller's agent in buying the goods. He was to buy them for her, not for Jones. This guarantee was not of an existing debt, but was a guarantee for goods to be advanced to Miss M. afterwards; whether it would be acted on or not, or whether the goods would be furnished by any one, and by whom, Jones could not tell, without notice.

In *Edmondston* v. *Drake*, 5 Pet. 629, the guarantee was addressed, not to the party who was to be benefited by it, but, like this one, to third persons. Through the agency of the persons to whom it was addressed, the goods were purchased by the party; but the credit was given to the guarantee, by the merchants who furnished them. So, in this case, the letter of guaranty was addressed to Williams; he purchased the goods, and they *211] were furnished on the faith of the *guarantee. The two cases are precisely alike in this respect; and yet Chief Justice MARSHALL (page 637), says, in the first case, "it would be an extraordinary departure from that exactness and precision which peculiarly distinguish mercantile transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character, and hold the writer responsible, without giving him notice that he had acted on it." If Williams was the agent of Jones in this case, were not Castillo & Black the agents of Edmondston, in the case in 5 Peters; and if notice on that account was not necessary in the latter case, does it not inevitably follow, that Chief Justice MARSHALL was wrong, when he expressed his surprise that any person should doubt that it was not required in the other.

In *Douglass* v. *Reynolds*, 7 Pet. 113, the court decided, that "a party giving a letter of credit, has a right to know whether it be accepted, and whether credit is given on it, or not;" indeed, until such notice, there is no contract. The court, in that case, say, such notice is most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given." That case also decides, that a demand of payment of the principal should be first made, before the guarantor is resorted to. The guarantee in that case was stronger than this; the guarantors bound themselves, jointly and severally, to be responsible for all advances, &c. The principle of the case in 7 Peters, is applicable to continuing guarantors, or to guarantors of a single transaction; as was decided in *Lee* v. *Dick*, 10 Pet. 482. The court, in this last case, says: "there are many cases where the guarantee is of a specific, existing demand, by a promissory note, or other evidence of a debt, and such guarantee is given upon the note itself, or with a reference to it, and recognition of it, when no notice would be necessary. The guarantor, in such cases, knows precisely what he guaranties, and the extent of his responsibility. But when the guarantee is prospective, and to attach upon future transactions, and the guarantor uninformed whether his guarantee has been accepted and

acted upon, or not, the fitness and justness of the rule, requiring notice, is supported by considerations that are unanswerable." It is believed, the above authorities are decisive of this case.

*STORY, Justice, delivered the opinon of the court.—This cause comes before us upon a certificate of division of opinion of the judges of the circuit court of West Tennessee. The plaintiffs, Adams and others, brought an action against the defendant, Jones, for the amount of certain goods supplied by them, upon the credit of the following letter of guaranty: [*212

"Raleigh, September 25th, 1832.

"MR. WILLIAM A. WILLIAMS:

"SIR:—On this sheet, you have the list of articles wanted for Miss Betsey Miller's millinery establishment, which you were so very good as to offer to purchase for her. I will be security for the payment, either to you, or to the merchants in New York of whom you may purchase, and you may leave this in their hands, or otherwise, as may be proper. I hope, to your favor and view, will be added all possible favor by the merchants, to the young lady, in quality and prices of goods, as I have no doubt she merits as much, by her late knowledge of her business, industry, and pure conduct and principles, as any whatever. CALVIN JONES"

"After the compliment that is paid me above, I should hardly be willing to place my name so near it, was I not told, it was necessary and proper the merchants should know my handwriting generally, and particularly my signature. ELIZABETH A. MILLER."

The list of the articles was appended to the letter.

Upon the trial of the cause, upon the general issue, before the jury, it occurred as a question, "whether the plaintiffs were bound to give notice to the defendant that they had accepted or acted upon the guarantee, and given credit on the faith of it." Upon which question, the opinions of the judges were opposed; and thereupon, according to the act of congress, on motion of the plaintiffs, by their attorney, the point has been certified to this court. A statement of the pleadings, and also a statement of facts, made under the direction of the judges, have been certified as a part of the record. Some diversity of opinion has existed among the judges, as to the true nature and extent of the question certified; whether it meant to ask the opinion of this court, whether, under all the circumstances disclosed in the evidence, any personal notice to the defendant, or any other notice than what was *made known to Williams, was necessary to fix the liability of the defendant; or whether it meant only to put the general question of the necessity of notice in cases of guarantee. If the former interpretation were adopted, it would call upon this court to express an opinion upon the whole facts of the case, instead of particular points of law growing out of the same; a practice, which is not deemed by the majority of the court to be correct, under the act of congress on this subject. (Act of 1802, ch. 31, § 6.) The latter is the interpretation which we are disposed to adopt; and the question, which, under this view, is presented, is, whether upon a letter of guaranty, addressed to a particular person, or to persons generally, for a future credit to be given to the party in whose favor the [*213

guarantee is drawn, notice is necessary to be given to the guarantor, that the person, giving the credit, has accepted or acted upon the guarantee, and given the credit on the faith of it. We are all of opinion, that it is necessary; and that this is not now an open question in this court, after the decisions which have been made in *Russell* v. *Clarke*, 7 Cranch 69; *Edmondston* v. *Drake*, 5 Pet. 624; *Douglass* v. *Reynolds*, 7 Ibid. 113; *Lee* v. *Dick*, 10 Ibid. 482; and again recognised at the present term, in the case of *Reynolds* v. *Douglass* (*post*, p. 497). It is, in itself, a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses, which might otherwise be unknown to him; and to avail himself of the appropriate means, in law and equity, to compel the other parties to discharge him from future responsibility. The reason applies with still greater force, to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom, and under what circumstances, the guarantee attached, and to what period it might be protracted. Transactions between the other parties, to a great extent, might, from time to time, exist, in which credits might be given, and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the question were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own.

It is highly probable, that the real questions intended to be raised before this court, upon the certificate of division, were, whether, upon the whole evidence, Williams was not to be treated as the agent of the defendant, as well as of Miss Miller, in the *procurement of this credit from the plaintiffs; and if so, whether the knowledge of Williams of the credit by the plaintiffs to Miss Miller upon the faith of the guarantee, was not full notice also to the defendant, and thus dispensed with any further and other notice to the defendant. These were matters of fact, very proper for the consideration of the jury at the trial; and, if satisfactorily established, would have dispensed with any further notice: but they are by no means matters of law upon which we are called, on the present occasion, to give any opinion. A certificate will be sent to the circuit court, in conformity to this opinion.

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Baldwin, Justice, dissented.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee; and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, "that the plaintiffs were bound to give notice to the defendant that they had accepted or acted upon the guarantee, and given credit on the faith of it." Whereupon, it is now here adjudged and ordered by this court, that it be so certified to the said circuit court.

*United States, Appellants, *v.* William Mills's Heirs.

Florida land-claims.

A grant of land in East Florida was made by the governor, before the cession of Florida by Spain to the United States, on conditions which were not performed by the grantee within the time limited in the grant; or any exertions made by him to perform them. No sufficient cause for the non-performance of the conditions having shown, the decree of the supreme court of East Florida which confirmed the grant, was reversed.

Appeal from the Superior Court of East Florida. In the superior court of East Florida, the widow and children, heirs of William Mills, deceased, presented a petition, claiming title to a tract of land, situated on the east side of the river St. Johns, at a place called Buffalo Bluff, abont two miles below the former plantation of Panton, Leslie & Company. This land was claimed under a grant of Governor Coppinger, dated, St. Augustine, 10th April 1817.

The petition of William Mills to Governor Coppinger, dated 17th March 1817, stated, that he was an inhabitant of Fernandina, and that, in 1805, he had obtained permission from the government to erect a water saw-mill, in the place called Mulberry branch, near the head of Matanzas river, the certificate of which was mislaid; and after erecting the buildings, they were burned down by the rebels, in a sedition which took place in the year 1812; and wishing to build another saw-mill east of the river St. Johns, at Buffalo Bluff, he asked that a tract of two miles square be granted to him, with title and property thereto, in order that he might carry his purpose into effect. Governor Coppinger, on the 10th of August 1817, granted the permission asked for by the petition, to erect a water saw-mill on the river St. Johns, on the east side thereof, at a place called Buffalo Bluff; under the express conditions, that until he carries said work into effect, this grant of land will be null. "It being well understood, that unless the said machinery be built and erected, within the term of six months, this favor will be null, and of no value; as it can never be understood to have been granted with any other view but that of protecting the inhabitant settlers, and stimulating them to industry, for the known advantages which result from it to the province, and consequently to the interests of the king."

*The claimants afterwards filed a supplementary or amended petition, in which they stated, that the grantee had been deterred from [*216 making the improvements mentioned in his petition to Governor Coppinger, by Indian hostilities, and by threats to persons and their property, by hostile Indians, negroes and marauders; and they further stated, that by the cession of Florida to the United States, by the treaty of 22d of February 1819, they were further prevented making the improvements, as it was uncertain how their rights to the land would be affected by the change of government.

The answers of the attorney of the United States to the petition and the amended petition, asserted the non-compliance of the petitioner with the condition of the grant; and as to the amended petition, alleged, as to the dangers of proceeding to erect the mill, that if any such difficulties existed at all, they existed to as great an extent, at the time when it is alleged that said grant was made, and when the ancestor of the claimant took upon

himself the performance of the condition therein mentioned, as at any time since.

Evidence was taken by both parties, and the claim of the petitioners was confirmed by the superior court of Florida, at July term 1837. The United States prosecuted this appeal.

The case was argued by *Butler*, Attorney-General, for the United States. No counsel appeared for the appellees.

Wayne, Justice, delivered the opinion of the court.—This is an appeal from a decree of the superior court of East Florida, confirming a land-claim. It differs only from the case of the *United States* v. *Z. Kingsley*, decided by the court at this term (*post*, p. 476), in this: that the conditions upon which the appellee was to have a property in the land petitioned for, was limited to performance within six months from the date of the governor's decree. It was not performed. Nor was any attempt made to perform it by the appellee, in his lifetime, or by his representatives, after his death. No sufficient cause for non-performance is shown, within the time limited, nor afterwards; to bring it within those rules of justice and equity, which this court has said shall be applied in its construction of the 8th article of the treaty of February 1819, with Spain; on its consideration of grants made upon consideration. For the reasons stated in the case of *Kingsley*,
*217] the court is of *opinion, that the decree of the court below in this case, should be reversed, and it is ordered accordingly.

Baldwin, Justice, dissented.

This cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the petitioner has not fulfilled the condition of the grant; and that, therefore, the grant or concession is null and void; and that the petitioner has no right or title to the land. Whereupon, it is now here decreed and ordered by this court, that the decree of the said superior court in this cause be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said superior court, with directions to enter a decree in conformity to the opinion of this court.

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*218] *Moses E. Levy, Appellant, *v.* Fernando de la Maza Arredondo and Juan de Entralgo, Appellees.

Florida land-claims.

In the superior court of East Florida, the complainant filed a bill, claiming compensation for the non-performance of certain contracts for the sale of lands in East Florida, referring to the contracts, the contents of which were stated to be set out in the bill of the complainant; which was replied to by the defendants. The contracts were not proved in the cause, by testimony; nor was the non-production of them duly accounted for, nor secondary evidence of the contents thereof, so far as practicable, given before the superior court. The supreme court, for this defect and imperfection in the proceedings, had not sufficient evidence before them to found any final and satisfactory decree; the decree of the court of appeals of East Florida, and the decree of the superior court of East Florida, was, therefore, reversed, and the cause remanded to the court of appeals, to allow the pleadings to be amended, and the documents referred to or the contents of the same, to be duly authenticated and proved, &c.

Levy v. Arredondo.

APPEAL from the Court of Appeals of Florida.

This case was argued on the merits, by *Preston* and *Thompson*, for the appellant; and by *Jones*, for the defendant.

The court considered, that a certain contract between the appellant and Fernando de la Maza Arredondo, of 22d January 1822, and a contract between the complainant and Joseph M. Arredondo, of 13th July 1824, which had been referred to in the proceedings in the courts below, and which were not in the record, were necessary to the decision of the cause, made the following order; which was delivered by—

WAYNE, Justice.—The court has had this case under frequent consultation, since the argument of it, and as there is much diversity of opinion among the judges, in regard to the effect which the contract of the 22d January 1822, between the complainant and Fernando M. Arredondo, Jr., and also in regard to the effect which the contract of the 13th July 1824, between the complainant and Joseph M. Arredondo, would have upon the rights and equities of the parties; and it being considered, from the manner the complainant has set out those contracts in his bill, and from the manner they are replied to by the defendant, Arredondo, that they are substantially exhibits in the *cause which should have been annexed by the complainant to his bill; and which the superior court of the eastern [*219 district of Florida might have called for, before it proceeded to make any decree in the cause; it is determined by this court, without giving any opinion upon the decision of the court of appeals of Florida in the cause, to reverse that decree, and also to reverse the decree of the superior court of East Florida, in the cause upon which it was carried up by appeal to the court of appeals: and both of the same are hereby reversed; and the court remands the cause for further proceedings; making it obligatory upon the complainant to produce, on the trial, the contracts of the 22d January 1822, and that of the 13th July 1824, or satisfactorily to account for the same: with liberty to the parties in the cause to use, on such trial, the evidence already taken, and to adduce such other evidence as either may offer in proof of their respective equities; and to amend their bills and answers; including any answer which the defendant, Entralgo, may offer to make to the complainant's bill, upon such terms as the court below may impose, upon any application made by Entralgo, or his counsel, to set aside the order *pro confesso* against him.

THIS cause came on to be heard, on the transcript of the record from the court of appeals for the territory of Florida, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the contract of 22d January 1822, between the complainant and F. M. Arredondo, Jr., and also the contract of 13th July 1824, between the complainant and F. M. Arredondo, from the manner in which they are set out in the bill of complainant and replied to by the defendant, are such exhibits as ought to have been annexed by the complainant to his bill in the superior court for the district of East Florida, and ought to have been proved as evidence in the cause, or the non-production thereof duly accounted for, and secondary evidence of the contents thereof, as far as practicable, given, before the superior court of the territory of Florida proceeded to render any decree in the prem-

ises; that for this defect and imperfection in the proceedings, this court have not sufficient materials before them whereon to found any final and satisfactory decree; and that justice requires that the cause should be opened in the court below, for further proofs, as well in regard to the documents aforesaid, as in regard to any other evidence which may further establish the merits
*220] of the case on either side. It is therefore ordered, adjudged *and decreed by this court, that the decree of the said court of appeals of the territory of Florida, and also the decree of the superior court of the said territory, be and they are hereby reversed and annulled. And it is further ordered, adjudged and decreed by this court, that the cause be remanded to the said court of appeals, with directions to allow the pleadings in the said cause to be amended by the parties; the documents aforesaid, or the contents thereof, to be duly authenticated and proved; and such other proceedings in the cause to be had, as to justice and equity shall appertain. And the said court of appeals is either to cause such further proceedings aforesaid to be had before itself, or the cause remanded to the said superior court for the same purposes, as the one or the other course may be proper, or may be required by the constitution of the said courts, and the laws and practice appertaining thereto. And it is also decreed, that each party pay his own costs in this court.

BALDWIN, Justice, dissented.

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*221] *N. ROGERS & SONS, Plaintiffs in error, *v.* JAMES BATCHELOR and others, Administrators of ABEL H. BUCKHOLTS, Deceased.

Debt.—Partnership.

An action of debt was instituted in the district court of the United States, on an obligation under the hands and seals of two persons; the action was against one of the parties to the instrument. The laws of Mississippi allow an action on such an instrument to be maintained against one of the parties only.[1]

The funds of a partnership cannot be rightfully applied, by one of the partners, to the discharge of his own separate pre-existing debts, without the express or implied assent of the other parties; and it makes no difference, in such a case, that the separate creditor had no knowledge, at the time, of the fact of the fund being partnership property.[2]

Whatever acts are done by any partner, in regard to partnership property or contracts, beyond the scope and objects of the partnership, must, in general, to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner.

The authority of each partner to dispose of the partnership funds, strictly and rightfully extends only to the business and transactions of the partnership itself; and any disposition of those funds, by any partner, beyond such purpose, is an excess of his authority as a partner, and a misappropriation of those funds, for which the partner is responsible to the partnership; though in the case of *bonâ fide* purchasers, without notice, for a valuable consideration, the partnership may be bound by the acts of one partner.

If one partner write a letter in his own name, to his creditor, referring to the concerns of the partnership, and his own private debts to those to whom the letter is addressed, the letter not

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[1] Amis *v.* Smith, 16 Pet. 303; Coffee *v.* Planters' Bank, 13 How. 183.

[2] McKinney *v.* Brights, 16 Penn. St. 399; Geery *v.* Cockcroft, 1 J. & Sp. 146. See Wiley *v.* Allen, 26 Ga. 568, where this case was dissented from, so far as it holds, that want of knowledge on the part of the separate creditor, that the fund was partnership property, did not affect the right of partners; and as not distinguishing between money and other property.

being written in the name of the firm; it cannot be presumed, that the other partner had a knowledge of the contents of the letter, and sanctioned them; unless some proof to this effect was given, the other partner ought not to be bound by the contents of the letter.

Error from the District Court for the district of Mississippi. In the district court of Mississippi, an action of debt was instituted, on an obligation executed on the first day of January 1824, by which John Richards and A. H. Buckholts promised, under their respective hands and seals, to pay to N. Rogers & Sons, on the first day of April 1824, $3288, with interest from the date. The defendant, Abel H. Buckholts, pleaded payment, and there was a general replication. After a trial and verdict for the defendant, in 1833, and a new trial granted, the cause was again tried, in February 1836—the administrators of A. H. Buckholts having been *brought in after his decease; and a verdict was again found for the defendant: the [*222 jury, at the same time, having certified, that the plaintiffs, N. Rogers & Sons, were indebted to the estate of A. H. Buckholts, the sum of $826.

A bill of exceptions was taken by the plaintiffs to the charge of the court; and judgment having been rendered on the verdict for the defendants, the plaintiffs prosecuted this writ of error.

The bill of exceptions stated, that on the trial of the cause, the defendants set up off-sets to the demand of the plaintiffs. They were contained in an account, made up to April 1st, 1830; and showed a balance due to John Richards & Co., which firm was composed of John Richards and Abel H. Buckholts; the balance due was $1541. The accounts credited N. Rogers & Sons, the plaintiffs, with the amount of the note for which the suit was instituted, and with interest on it for six years, amounting to $4866; and charged several items of payments to the plaintiffs, with interest on the same, showing the balance of $1541.

Two items on the debit side of the account were made the subject of controversy, viz: a charge of $1450.46, received from Lambert & Brothers on the 4th of September 1825; and a charge of $3000, under date of January 1827, for John Richards's acceptance of the draft of N. Rogers & Sons. The account was stated as follows:

Dr. N. Rogers & Sons, in account-current (account to April 1st, 1830), with John Richards & Co. Cr.

The debits, among others, were:

1825, Sept. 4.	To cash from Lambert & Bro's,	$1450.46	
	Interest on the same,	530.62	
			$1981.08
1827.	To acceptances of your draft on John Richards & Co., payable at 6 mo.	3000	
	Interest,	800	
			$3800

The credits were:

1827, April 19.	By amount of John Richards & A. H. Buckholts' note, due this day,	$3325.25
	Interest on same, 6 years,	1545.06

*In support of this set-off, the defendants relied upon the testimony [*223 of one Rowan, who testified, that some time in the year 1830, he was requested by Buckholts to be present at a conversation he expected to have

at his office, with a Mr. Rogers (a member of the firm of Rogers & Sons, as he understands), relative to their accounts, and requested him to note down and recollect the conversation; that some time after, Rogers came into the office, and a conversation ensued relative to their accounts; that the accounts before them were accounts made out by Rogers & Sons, between themselves and Richards & Buckholts, and John Richards & Co., and John Richards; and Lambert & Brothers, in account with John Richards & Co., Richards & Buckholts, and John Richards, and an account made out by Buckholts, between Richards & Buckholts, and Rogers & Sons; that in their conversation relative to those accounts, Buckholts asked Rogers if the several items charged in his account had not been received, and Rogers admitted they had been; that among other items so admitted, was the item charged in the account of off-sets, filed under the plea of payment, of $1450.46, and the item of $3000. The witness stated, that in their conversation about the $1450.46 item, Rogers admitted that sum had been received by Rogers & Sons, from Lambert & Brothers, in New York, and was part of the proceeds of seventy-four bales of cotton, shipped by Richards & Buckholts to Lambert & Brothers. That very little was said about the item of $3000; the witness recollected nothing more but an admission that it had been received. That something was said between Buckholts and Rogers about the right to apply moneys to the payment of John Richards's private debts; Buckholts contending, Rogers had no right to do so, and Rogers that he had; but which particular item of payment, witness did not understand. This was all the evidence introduced by defendants in support of the above two items of $1450.46, and $3000. The said witness further testified, that he had understood the said John Richards had once failed, before he went into partnership with the said Buckholts. No other witness was introduced on the part of the defendants. The defendants admitted, that in the account made out by Buckholts between Richards & Buckholts and Rogers & Sons, above mentioned, about which the said
*224] conversation between Buckholts and Rogers took place, the item of *$3000 was charged by Buckholts, in his said account, as an item received upon a bill of exchange, drawn in 1825, by Rogers & Sons on John Richards alone.

The plaintiffs then introduced a letter from John Richards to them, dated Natchez, June 6th, 1825, of which the following are extracts:

"To-day we have amount of sales of all the cotton we own (except half interest in seventy-eight bales gone to England, which was sold by Messrs. Lambert, in New York, at twenty cents, subject to benefit of half profits, without being accountable for any loss); which, although bought lately, nearly netted twenty per cent. Our profits on cotton will be from four to five thousand dollars; and our business is, I think, prospering. The following is about the payments we have left in the hands of Messrs. Lambert, Brothers & Co., to be divided between you and them:

Part sales of seventy-eight bales of cotton, about - - -	$2800
Foster & Steel's notes, - - - - - - - - -	4250
My three notes, - - - - - - - - - -	1500
This intended to pay my own debts, - - - -	$8550

On account of John Richards & Co.

The half profits of seventy-eight bales of cotton, gone to England, which I hope may be - - - - - - - - -	$1500
J. R. & Co.'s notes. due next winter, at New Orleans, - -	1500
	$3000

"This day, sent to New Orleans $654.55, to purchase exchange on New York, which will be forwarded, as soon as received, to go to the payment of J. R. & Co.'s debt to you and Messrs. Lambert, Brothers & Co. With these payments, I hope you will be satisfied until next winter. I have hopes of selling my private residence, at a sacrifice of $2500, which will be sent to you as soon as realized. I have a prospect of getting for it $9000."

The plaintiffs, by their attorney, requested the court to charge the jury: 1st. That the defendants were not entitled, upon the evidence before them, to the item of $1450.46, *as an off-set to the plaintiff's claim. 2d. That the defendants were not entitled, upon the evidence before the [*225 jury, to the item of $3000, as an off-set. Which charge the court refused to give.

And thereupon, the defendants requested the court to charge as follows: 1st. That if the jury believe the off-set of $1450.46 was the proceeds of cotton of Richards & Buckholts, or John Richards & Co., shipped on their joint accounts, then it is a legal off-set to a joint debt; and cannot be applied to the individual debt of John Richards, without proof that Buckholts was himself consulted, and agreed to it. 2d. That if the jury believed that the draft of $3000 was paid by Richards & Buckholts, or John Richards & Co., or out of the effects of either of those firms, with the knowledge of Rogers & Sons, then, in law, it is a legal off-set to the joint debt of said Richards & Buckholts, or John Richards & Co., and cannot be applied to the private debt of either partner, without the consent of the other partner. 3d. That the letter of John Richards, read in this case, is not evidence against Buckholts; unless the jury believe, that Buckholts knew of the letter, and sanctioned its contents (which letter is the one before mentioned in this bill of exceptions). Which charge the court gave, as requested.

To which decision, in refusing to charge as requested by the plaintiffs, and in charging as requested by the defendants, the plaintiffs excepted. The defendants remitted $560, part of the debt certified by the jury.

The case was argued by *Butler*, for the plaintiffs in error; and by *Hoban* and *Key*, for the defendants.

Butler, for the plaintiffs in error, stated, that Mr. Richards, before his partnership with Buckholts, became largely indebted to N. Rogers & Sons, in the business of shipping cotton. Afterwards, in 1825, the firm of Richards & Co. shipped seventy-eight bales of cotton to Lambert & Brothers; and the proceeds of the shipments were, according to the directions of the shippers, paid over to the plaintiffs in error; and of this amount, $1400 were, according to the directions of the letter from Richards, placed to the credit of Richards. The judge of the district court charged the jury, that unless Buckholts had been consulted about this application of the funds, and

*had assented to it, the appropriation could not be sustained. On whom does the burden of proof lie, to show the other partner did not consent. It should fall upon the partner. After the property of a partnership is sold, one partner may take part of the proceeds of the sale to pay his debt; and the creditor to whom the payment is made may retain the money, if he does not know the partner had objected to the appropriation. The instructions given by the judge to the jury, were therefore erroneous. Cited, *Harrison* v. *Sterry*, 5 Cranch 289; *Winship* v. *United States Bank*, 5 Pet. 529; 13 East 175.

As to the item of $3000, Mr. Butler contended, that this grew out of a draft drawn by the plaintiffs on John Richards alone. John Richards accepted the bill, and it was paid when at maturity. The account charges this as "our acceptance;" but this was not the fact; the evidence shows that the bill was drawn on John Richards, and the drawers had no right to know it was paid out of the partnership funds. There is nothing to show they did know this. Cited, 2 Stark. Evid. 25, 588, note; 9 Johns. 500; *Walden* v. *Sherburne*, 15 Ibid. 409; 3 Pick. 5. The whole of the case depends on the good faith of the transaction. The judge did not leave the question of good faith to the jury; but laid down the proposition, that the fact of the partnership property having been taken to pay the acceptance, was sufficient to prevent the plaintiffs recovering. The cases on which the counsel for the defendants rely are cases of guarantee.

There has been great neglect on the part of Mr. Buckholts, in not having given notice that the acceptance of the draft on Richards was not to be charged to him. The transaction was in 1825; and there is no evidence, that objection to the credit of the same to Richards alone, was made, until long afterwards. All the cases which have been cited, are cases where objections were immediately made and communicated. In reference to the $1450.46, the credit must have been given in the books of the plaintiffs in error, in 1825; and no objection to this credit was made until 1830. Cited, 7 Cranch 147; 2 Barn. & Ald. 678.

*227] *Hoban* and *Key*, for the defendant, said, the question presented *in this case is, whether one partner has a right to pay his separate debts out of the partnership effects. The letter from Richards shows that he was using the partnership property for that purpose. The charge of the court is, that one partner cannot appropriate the property of the partnership for such a purpose, without the approbation of his partner. Such an appropriation is, *per se*, fraudulent. If it is known to be partnership property, by the private creditor, it is fraudulent in him to receive it. 1 East 51; 7 Wend. 328. All this was matter for the jury; and they have passed upon it on two trials, and always in favor of the defendants.

The burden of proof is altogether on the party who receives partnership property, for his own benefit, in a transaction with one partner only. Cited, Collyer on Partnership 279; *Dob* v. *Halsey*, 16 Johns. 34; 1 Wend. 531. In England, it never was contended, that partnership property could be taken to pay a partnership debt, without the knowledge and consent of the other partner, expressly given, or well known. 6 Wend. 551; 19 Johns. 157; 5 Cow. 489; 2 Caines 246; 3 Wend. 415.

Story, Justice, delivered the opinion of the court.—This cause comes

before us on a writ of error to the district court of the district of Mississippi. The original action was debt, brought by the plaintiffs in error (Rogers & Sons) against Abel H. Buckholts, upon the following writing obligatory: "Natchez, Mississippi. $3288.03. On the first day of April next, we promise to pay N. Rogers & Sons, or order, three thousand, two hundr[illegible] and eighty-eight dollars, three cents, value received, with interest from date. Witness our hands and seals, this first day of January 1824. Jno. Richards [seal], A. H. Buckholts [seal]." Upon such an instrument, by the laws of Mississippi, one of the parties may be sued alone; and accordingly, Richards was no party to the suit. Upon the plea of payment, issue was joined, and pending the proceedings, Buckholts died, and his administrators were made parties; and upon the trial, a verdict was found for the defendants for the sum of $1826.74, being the balance due to them upon certain set-offs set up at the trial. A bill of exception was taken at the trial, by the plaintiffs; and judgment having passed for the defendants, the present writ of error has been brought to revise that judgment.

*By the bill of exceptions, it appears, that the defendants set up as a set-off, an account headed "Dr.—Messrs. N. Rogers & Sons, in account-current to first of April 1830, with John Richards & Co.—Cr.," on the debit side of which account were the two following items, which constituted the grounds of the objections, which have been made at the argument—"To cash, $1450.46." "To our acceptance of your draft, payable at six months, $3000." To support their case, the defendants offered the testimony of one Rowan; who testified to a conversation had in his presence, in the year 1830, between Buckholts and one of the plaintiffs, relative to their accounts; that the accounts then before them were accounts made out by Rogers & Sons, between themselves and Richards & Buckholts, and John Richards & Co., and John Richards and Lambert & Brothers in account with John Richards & Co., Richards & Buckholts, and John Richards; and an account made out by Buckholts between Richards & Buckholts and Rogers & Sons. In the conversation relative to these accounts, Buckholts asked Rogers if the several items charged in his account had not been received; and Rogers admitted that they had been. Among other items so admitted, were the above items of $1450.46, and $3000. In the conversation about the item of 1450.46, Rogers admitted, that the sum had been received by Rogers & Sons, from Lambert & Brothers, in New York, and that it was part of the proceeds of seventy-four bales of cotton, shipped by Richards & Buckholts to Lambert & Brothers. Very little was said about the item of $3000. Something was said between Buckholts and Rogers, about the right to apply moneys to the payment of John Richards's private debts, Buckholts contending, that he had no right so to do, and Rogers that he had; but which particular item of payment, the witness did not understand. This was all the evidence of payment introduced by the defendants to support the above two items of $1450.46, and $3000. The witness stated, that he had understood, that John Richards had once failed, before he went into partnership with Buckholts. It was admitted by the defendants, that the item of $3000 was for a bill of exchange, drawn in 1825, by Rogers & Sons, on John Richards alone. [*228

The plaintiffs then introduced a letter, written by John Richards to the plaintiffs, dated at Natchez, June 6th, 1825 (which is in *the re- [*229

cord), containing statements relative to a shipment of seventy-eight bales of cotton, made to Lambert & Co., and to certain payments, which, the letter says, "we have left in the hands of Messrs. Lambert, Brothers & Co.; to be divided among you and them." It then enumerates $8550, "intended to pay my own debts," and on account of Richards & Co. $3000. It then adds, that the sum of $654.55 had been that day sent to New Orleans to purchase exchange on New York, to be forwarded, and go to the payment of John Richards & Co.'s debt to plaintiffs, and Messrs. Lambert, Brothers & Co.

Upon this evidence, the plaintiffs requested the court to charge the jury, that the defendants were not entitled, upon the evidence before them, to the item of $1450.46, as an off-set to the plaintiffs' claim; and also, that the defendants were not entitled, upon the evidence before the jury, to the item of the $3000, as an off-set, which charge the court refused to give; and in our judgment, very properly refused to give, as it involved the determination of matters of fact, properly belonged to the province of the jury.

The defendants then requested the court to charge the jury as follows: "1st. That if the jury believe the off-set of $1450.46 was the proceeds of cotton of Richards & Buckholts, or John Richards & Co., shipped on their joint accounts, then it is a legal off-set to a joint debt, and cannot be applied to an individual debt of John Richards, without proof that Buckholts was himself consulted, and agreed to it. 2d. That if the jury believed, that the draft of $3000 was paid by Richards & Buckholts or John Richards & Co., or out of the effects of either of those firms, with the knowledge of Rogers & Sons, then in law it is a legal off-set to the joint debt of the said Richards & Buckholts, or John Richards & Co., and cannot be applied to the private debt of either partner, without the consent of the other partner. 3d. That the letter of John Richards, read in this case, is not evidence against Buckholts, unless the jury believe that Buckholts knew of the letter, and sanctioned its contents." The court gave the charge as requested; and the present bill of exceptions has brought before us for consideration, the propriety of each of these instructions.

The first instruction raises these questions: whether the funds of a partnership can be rightfully applied by one partner to the discharge *of his own separate pre-existing debt, without the assent, express or implied, of the other partner; and whether it makes any difference, in such a case, that the separate creditor had no knowledge, at the time, of the fact of the fund being partnership property. We are of opinion in the negative, on both questions. The implied authority of each partner to dispose of the partnership funds, strictly and rightfully, extends only to the business and transactions of the partnership itself; and any disposition of those funds by any partner, beyond such purposes, is an excess of his authority as partner, and a misappropriation of those funds, for which the partner is responsible to the partnership, though in the case of *bonâ fide* purchasers, without notice, for a valuable consideration, the partnership may be bound by such acts. Whatever acts, therefore, are done by any partner, in regard to partnership property or contracts, beyond the scope and objects of the partnership; must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner. Such is the general principle,

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and in, our judgment, it is founded in good sense and reason. One man ought not to be permitted to dispose of the property, or to bind the rights of another, unless the latter has authorized the act. In the case of a partner paying his own separate debt out of the partnership funds, it is manifest, that it is a violation of his duty, and of the rights of his partners, unless they have assented to it. The act is an illegal conversion of the funds; and the separate creditor can have no better title to the funds, than the partner himself had.

Does it make any difference, that the separate creditor had no knowledge, at the time, that there was a misappropriation of the partnership funds? We think not. If he had such knowledge, undoubtedly, he would be guilty of gross fraud, not only in morals, but in law. That was expressly decided in *Shireff* v. *Wilks*, 1 East 48; and indeed, seems too plain, upon principle, to admit of any serious doubt. But we do not think, that such knowledge is an essential ingredient in such a case. The true question is, whether the title to the property has passed from the partnership to the separate creditor. If it has not, then the partnership may re-assert their claim to it, in the hands of such creditor. The case of *Ridley* v. *Taylor*, 13 East 175, has been supposed to inculcate a different and more modified doctrine. But upon a close examination, it will be found to have turned upon its own peculiar circumstances. Lord ELLENBOROUGH, in *that case, [*231 admitted, that one partner could not pledge the partnership property for his own separate debt; and if he could not do such an act of a limited nature, it is somewhat difficult to see, how he could do an act of a higher nature, and sell the property. And his judgment seems to have been greatly influenced by the consideration, that the creditor, in that case, might fairly presume, that the partner was the real owner of the partnership security; and that there was an absence of all the evidence (which existed and might have been produced) to show, that the other partner did not know, and had not authorized the act. If it had appeared from any evidence, that the act was unknown to, or unauthorized by, the other partners, it is very far from being clear, that the case could have been decided in favor of the separate creditor; for his lordship seems to have put the case upon the ground, that either actual covin in the creditor should be shown, or that there should be pregnant evidence, that the act was unauthorized by the other partners. The case of *Green* v. *Deacon*, 2 Stark. 347, before Lord ELLENBOROUGH, seems to have proceeded upon the ground, that fraud, or knowledge by the separate creditor, was not a necessary ingredient. In the recent case *Ex parte Goulding*, 2 Glyn & Jam. 118, the vice-chancellor (Sir JOHN LEACH) seems to have adopted the broad ground upon which we are disposed to place the doctrine. Upon the appeal, his decision was confirmed by Lord LYNDHURST. Upon that occasion, his lordship said, "No principle can be more clear, than that where a partner and a creditor enter into a contract on a separate account, the partner cannot pledge the partnership funds, or give the partnership acceptances, in discharge of this contract, so as to bind the firm." There was no pretence, in that case, of any fraud on the part of the separate creditor; and Lord LYNDHURST seems to have put his judgment upon the ground, that unless the other partner assented to the transaction, he was not bound; and that it was the duty of the creditor to ascertain whether there was such assent or not.

The same question has been discussed in the American courts, on various occasions. In *Dob* v. *Halsey*, 16 Johns. 34, it was held by the court, that one partner could not apply partnership property to the payment of his own separate debt, without the assent of the other partners. On that occasion, Mr. Chief Justice SPENCER stated the difference between the decisions in New York, and those in England, to be merely this: that in New York, the court required the separate creditor, who had obtained the partnership paper for the private *debt of one of the partners, to show the assent of the whole firm to be bound; and that in England, the burden of proof was on the other partners, to show their want of knowledge, or dissent." The learned judge added, "I can perceive no substantial difference, whether the note of a firm be taken for a private debt of one of the partners, by a separate creditor of a partner, pledging the security of the firm, and taking the property of the firm, upon a purchase of one of the partners, to pay his private debt. In both cases, the act is equally injurious to the other partners. It is taking their common property to pay a private debt of one of the partners." The same doctrine has been, on various occasions, fully recognised in the supreme court of the same state. And we need do no more than refer to one of the latest, the case of *Evernghim* v. *Ensworth*, 7 Wend. 326. Indeed, it had been fully considered long before, in *Livingston* v. *Roosevelt*, 4 Johns. 251.

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It is true, that the precise point now before us, does not appear to have received any direct adjudication; for in all the cases above mentioned, there was a known application of the funds or securities of the partnership to the payment of the separate debt. But we think, that the true principle to be extracted from the authorities is, that one partner cannot apply the partnership funds or securities to the discharge of his own private debt, without their consent; and that without their consent, their title to the property is not divested, in favor of such separate creditor, whether he knew it to be partnership property or not. In short, his right depends, not upon his knowledge that it was partnership property, but upon the fact, whether the other partners had assented to such disposition of it, or not.

If we are right in the preceding views, they completely dispose of the second instruction. The point there put involves the additional ingredient, that the separate debt and draft of Richards for the $3000, was, with the knowledge of the plaintiffs (Rogers & Sons), paid out of the partnership funds; and if so, then, unless that payment was assented to by the other partner, it was clearly invalid, and not binding upon him. It is true, that the draft of $3000 was drawn on Richards alone; and therefore, it cannot be presumed, that the plaintiffs had knowledge, that it was accepted by the partnership, or paid out of the partnership funds. But the question was left, and properly left, to the jury, to say, whether the plaintiffs had such knowledge; and it they had, unless the other partner consented, the payment would be a fraud upon the partnership. *With the question, whether the jury have drawn a right conclusion, it is not for us to intermeddle. It was a matter fairly before them upon the evidence; and the decision upon matters of fact was their peculiar province.

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The third instruction admits of no real controversy. The letter purports to be written by Richards alone, and not in the name of the firm, or by the orders of the firm. It embraces topics belonging to his own private affairs,

as well as to those of the firm. Under such circumstances, not being written in the name of the firm, it cannot be presumed that the other partner had knowledge of its contents, and sanctioned them, unless some proof to that effect was offered to the jury. If the other partner did not know of the letter, or sanction its contents, it is plain, that he ought not to be bound by them; and such was the instruction given to the jury.

Upon the whole, our opinion is, that the judgment of the court below ought to be affirmed, with six per cent. interest, and costs.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Mississippi, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

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*Benjamin R. Lyon and others, Plaintiffs in error, *v.* James Auchincloss & Company. [*234

Bail.—Insolvency.

Bail was entered in the district court of the United States for the eastern district of Louisiana, for a defendant, against whom a suit was brought on certain promissory notes; the bail having been fixed, proceedings were afterwards commenced against them; and defence was taken, on the ground, that the plaintiff had made himself a party to a proceeding under the insolvent laws of Louisiana, which the principal had instituted against his creditors, and in which he had failed to obtain the relief allowed by those laws; a judgment having been given against him on his petition, in the district court in which they were instituted, and in the supreme court of Louisiana, to which he carried them by appeal: *Held*, that if the benefit of the insolvent laws had been extended to the principal, before the bail was fixed by proceedings against him, it might have become a question, whether they were not discharged, under the rule laid down by the court, in the case of Beers *v.* Haughton, 9 Pet. 329; but as the proceedings of the principal, for the benefit of those laws, were dismissed, on objections of the creditors, both in the district and supreme court of Louisiana, the bail can claim no exemption from the obligations of their bond, on account of those proceedings.

Error to the District Court for the Eastern District of Louisiana.

This case was argued, at the January term 1837, by *Butler*, for the plaintiffs, and by *Key*, for the defendants; and was held under advisement until this term; an examination of the rules of practice established by the district judge of the United States of the district of Louisiana, having been considered proper. The case is fully stated in the opinion of the court.

McLean, Justice, delivered the opinion of the court.—This case is before this court, from the district court for the eastern district of Louisiana, on a writ of error. An action was brought by Auchincloss & Co., against Nathaniel M. Riker, on certain promissory notes amounting to $2545. The defendant was arrested on a *capias*, and gave bond, with sureties, in the penal sum of $3500; that, should he be cast in the suit, he would pay the judgment, or surrender himself in execution to the marshal. At the May term 1835, a judgment in favor of the plaintiffs *was entered in the case; and in June following, a writ of *fieri facias* was issued on [*235 the judgment, which was returned, "no property found." In December of the same year, a *capias ad satisfaciendum* was issued, which was returned by

the marshal, "that the defendant could not be found." And afterwards, in February term 1836, on motion of plaintiffs' counsel, and on showing to the court that a *ca. sa.* had been issued and returned *non est inventus*, it was ordered, that the defendants' bail, Abraham B. Walker, Benjamin R. Lyon, and Pierre L. Baucher and Charles Gardiner, executors of P. P. Hall, show cause why judgment should not be entered against them, &c. And at the same term, B. R. Lyon, one of the bail, appeared by counsel, and reserving to himself the benefit of all exceptions to the rule taken in the case, filed the following pleas :—1. He admits his signature to the bond sued upon, but denies that it creates any obligation, whereupon he files the general issue. 2. That the said Auchincloss has made himself a party to the insolvent proceedings of the defendant, Riker, in this state, and is bound thereby, &c. On the 1st of March following, the court having maturely considered the rule taken on the bail of the defendant, order and adjudge that the same be made absolute ; and a judgment is entered against the bail.

In the course of the trial, the defendants offered in evidence the record of a suit in the first district of the state, entitled "N. M. Riker *v.* His Creditors," to prove that plaintiffs had made themselves parties to the proceedings in the said suit ; to the introduction of which record the plaintiffs objected, on the following grounds :—1. That if the defendant were present, he could not avail himself of said record ; and that his sureties could not. 2. That the defendants did not offer the record to prove the discharge of Riker by his creditors, under the state insolvent laws ; and that it could not be offered for any other purpose. 3. That it was admitted, opposition had been made in the state court by the creditors of Riker, which the court sustained ; and that he appealed to the supreme court, where his suit against his creditors was dismissed ; that the record offered, contained only the proceedings which were had in the inferior court. But the court overruled the objections, and admitted the record as evidence.

*236] *And the counsel for the bail moved the court that they be discharged, as it appeared, that Auchincloss, by his attorney, made opposition to the proceedings of Riker against his creditors, as shown by the record in evidence ; but the court overruled the motion ; and to this ruling of the court the defendants excepted. This proceeding against the bail is in conformity to the Louisiana practice.

By the record admitted in evidence, it appears, that Riker, in May 1835, filed his petition in the first judicial district court of Louisiana, representing his embarrassed condition, and his inability to pay his debts ; and he prayed that a meeting of his creditors should be called, to whom a surrender of his property could be made ; and that the relief given by law to unfortunate debtors might be extended to him. A schedule of the debts against him, and of his property, and the debts due to him, was filed ; and objection being made by his creditors to the relief prayed for, it was refused by the court. And from this judgment of the court, an appeal was taken by Riker, to the supreme court of the state. The result of this appeal is stated in the first bill of exceptions, as admitted by the parties.

It appears, by a certified copy of the rules made by the district judge, since 1824, that the insolvent laws of Louisiana have been adopted ; but this was not done, until subsequent to the rendition of the judgment against

the bail in this case. This court have had frequent occasion to consider the act of 26th May 1824, which authorizes the district judge of Louisiana to make rules of practice; but until such rules shall be adopted, it provides, that the modes of proceeding, in civil causes in the district court, shall be conformable to the laws directing the mode of practice in the district courts of the state. If the benefit of the insolvent law had been extended to Riker, before the bail were fixed, it might have become a question, whether they were not discharged, under the rule laid down by this court in the case *Beers* v. *Haughton*, 9 Pet. 329. But as the proceedings of Riker against his creditors were dismissed, on their objections, both in the district and supreme court, the bail can claim no exemption from the obligations of their bond, on account of these proceedings. A judgment has been obtained against Riker, which he has not satisfied, nor surrendered himself in discharge of his bail; and they have taken no steps to discharge themselves, *either by paying the judgment or surrendering their principal. The judgment against the bail must, therefore, be affirmed, with costs. [*237

This cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per cent. per annum.

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*James White, Plaintiff, *v.* Hiram Turk, James Vaughan and William Grant. [*238

Certificate of division

The intention of congress, in passing the act, authorizing a division of opinion of the judges of the circuit courts of the United States to be certified to the supreme court, was, that a division of the judges of the circuit court, upon a single and material point, in the progress of the cause, should be certified to the supreme court for its opinion, and not the whole cause. When a certificate of division brings up the whole cause, it would be, if the court should decide it, in effect, the exercise of original, rather than appellate jurisdiction. United States *v.* Bailey, 9 Pet. 367, cited and approved.

Certificate of Division from the Circuit Court of East Tennessee.

Coxe, for the plaintiff. No counsel appeared for the defendants. The case is fully stated in the opinion of the court.

McKinley, Justice, delivered the opinion of the court.—This is a case certified to this court from the circuit court of the United States for the eastern district of Tennessee. A petition was filed by the defendants, Vaughan and Grant, stating that a judgment had been rendered in that court, in favor of the plaintiff, against the said Turk, at the October term 1834, for the sum of $893.67; that said Turk had been arrested upon a *ca. sa.*, issued upon said judgment, and that the other two defendants had become his sureties in a bond, with condition that he should make his personal appearance at the court-house in Knoxville, on the second Monday of October next thereafter; then and there to pay a debt recovered by James

White, in said suit against said Turk, for $866.21½, take the oath of insolvency, or make a surrender of his property, as prescribed by the laws of the state; otherwise, the bond to remain in full force and virtue; that this bond, together with the *ca. sa.*, had been returned to said court, at its
*239] October term 1835, and judgment rendered thereon *against all the defendants, upon a motion, and without notice to them of the motion. For reasons stated in the petition, they prayed for and obtained a *supersedeas.*

At the October term 1836, of said court, "on a motion being made to set aside the judgment, for the reasons assigned in the petition; and on the ground, that the statutes of the state of Tennessee, referred to in the petition, and under which the bond was taken, and the judgment on it rendered, are a part of the insolvent laws of the state, and cannot apply to proceedings on an execution issued from the federal court; and on a full consideration of the subject, the opinions of the judges were opposed on the following points.

"1st. Whether the omission to name in the bond the sum called for in the execution, and the naming of a different sum, does not vitiate it? 2d. Whether the omission to state in the bond the court before which the defendant is to appear, take the oath of insolvency, or surrender his property, does not vitiate it? 3d. Whether the omission to set out in the bond, the writ of execution, or refer to it, does not vitiate it? 4th. Whether the proceedings authorized by the statutes of the state of Tennessee, passed in 1824, ch. 17, and in 1825, ch. 57, can apply to the federal courts? 5th. Whether, on account of the above defects, the bond is not void, and the proceedings on it, under the above statutes, consequently, a nullity?"

The intention of congress, in passing the act under which this proceeding has taken place, was, that a division of the judges of the circuit court, upon a single and material point, in the progress of the cause, should be certified to this court, for its opinion; and not the whole cause. The certificate of the judges, in this case, leaves no doubt that the whole cause was submitted to the circuit court, by the motion to set aside the judgment on the bond. And had the court agreed in opinion, and rendered a judgment upon the points submitted, it would have been conclusive of the whole matter in controversy between the parties. This certificate, therefore, brings the whole cause before this court; and if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction. *United States* v. *Bailey*, 9 Pet. 267; *Adams* v. *Jones*, decided at the present term of this court (*ante*, p. 207).

*240] *For these reasons, the cause is remanded to the circuit court, this court not having jurisdiction of the questions, as stated.

BALDWIN, Justice, dissented.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of East Tennessee, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the whole case has been certified to this court; and as it has been repeatedly decided by this court, that the whole case cannot be adjourned on a division of the judges, the court cannot decide this case in its present form. Whereupon, it is now here ordered and adjudged by this

court, that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice; this court not having jurisdiction over the case, as stated.

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*John J. Jenkins and others, Appellants, *v.* Sarah M. Pye and Edward Arell Pye, infants, by James B. Pye, their father and next friend, Appellees. [*241

Constructive fraud.—Laches.

The complainants in their bill alleged, that a conveyance of her real estate was made by a daughter, to her father, for a nominal consideration; the answer denied the matter stated in the bill; and the defendants gave evidence of the transfer of stock, to the value of $2000, on the day the conveyance was made, claiming that this was also the consideration in the deed: *Held*, that this evidence was admissible, without an amendment of the answer; it rebutted the allegation in the bill, that the deed was made wholly without consideration.

The complainants, as the ground to invalidate a deed, made by a daughter, of twenty-three years of age, to her father, by which she conveyed the estate of her deceased mother, to her father (he having a life-estate, as tenant by curtesy in the same), asserted, that such a deed ought, upon considerations of public policy, growing out of the relations of the parties, be deemed void. We do not deem it necessary to travel over all the English authorities which have been cited; we have looked into the leading cases, and cannot discover anything to warrant the broad and unqualified doctrine asserted; all the cases are accompanied with some ingredient showing undue influence exercised by the parent, operating on the fears or hopes of the child; and sufficient to show reasonable grounds to presume, that the act was not perfectly free and voluntary, on the part of the child; and in some cases, although there may be circumstances tending, in some small degree, to show undue influence, yet if the agreement appears reasonable, it has been considered enough to outweigh slight circumstances, so as not to affect the validity of the deed. It becomes less necessary for the court to go into a critical examination of the English chancery doctrine on this subject; for, should the cases be found to countenance it, we should not be disposed to adobt or sanction the broad principle, that the deed of a child to a parent, is to be deemed, *primâ facie*, void.

To consider a parent disqualified to take a voluntary deed from his child, without consideration on account of their relationship, is opening a principle at war with all filial, as well as parental, duty and affection; and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and to defraud his child. Whereas, the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result; such a presumption harmonizes with the moral obligations of a parent to provide for his child; and is founded upon the same benign principle that governs cases of purchases made by parents, in the name of a child; the natural and reasonable presumption in all transactions of this kind is, that a benefit was intended the child, because in the discharge of moral and parental duty.[1]

In the year 1813, a daughter, twenty-three years old, conveyed all her remainder in the real estate which had belonged to her mother, to her father, for a nominal consideration; she married two years afterwards, and died in 1818; no complaint of the transaction was made, in the lifetime of the daughter, nor during the lifetime *of the father, who died in 1831. Lapse of time, and the death of the parties to a deed, have always been considered, in a court of chancery, entitled to great weight; and almost controlling circumstances, in cases of this kind.[2] [*242

Pye *v.* Jenkins, 4 Cr. C. C. 541, reversed.

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[1] The transfer of a contingent interest from a child to a parent, is not viewed as a sale, but rather as a family arrangement, the validity of which does not depend on the adequacy of the price. Such conveyance is *primâ facie* valid; it is incumbent as the party attacking it to show undue influence. Sullivan *v.* Sullivan, 21 Law Rep. 531. See Taylor *v.* Taylor, 8 How. 183.

[2] See Godden *v.* Kimmell, 99 U. S. 211.

Jenkins v. Pye.

APPEAL from the Circuit Court of the District of Columbia, and county of Alexandria. In the circuit court, the appellees filed their bill against John J. Jenkins, and Mary, the wife of Robert Morrow, children of George Jenkins by a second wife (the said George Jenkins having died on the 8th day of April 1831), to set aside a certain deed executed by Eleanor Jenkins, who was the daughter of George Jenkins, and the mother of the complainants, and who died in 1818. George Jenkins had first intermarried with Mary Arell, who, as one of the heirs of Richard Arell, was entitled to considerable real estate, of which partition was made in 1797. She died, leaving but one child, the mother of the complainants; and her estate descended to her daughter, subject to a life-estate in George Jenkins, as tenant by the curtesy. George Jenkins, after her decease, married and had children by his second wife, one of whom was one of the appellants in the case. The deed was duly executed by the mother of the complainant, on the 15th of March 1813, and recorded on the 3d of November, in the same year, and conveyed in fee-simple to George Jenkins, for a nominal consideration, all the real estate and ground-rents to which she was entitled, as the heir of her mother. The bill also sought to recover the value of certain real estate, part of that conveyed to George Jenkins, which was afterwards sold by him to different persons; and also the rents of part of the real estate left unsold at the death of George Jenkins, and received by the executor, after his decease. The complainants charged in their bill, that the deed executed by their mother, being made wholly without consideration, operated to create a resulting trust in favor of Eleanor Jenkins and her heirs; and they claimed, if this could not be sustained, that the deed was obtained by the undue influence of paternal authority; and was, therefore, void, against the grantor and her heirs, in equity; and asked, that it be vacated as to all the property conveyed by it, which was unsold at the decease of George Jenkins.

The answer of the defendants denied that any undue influence was exercised by George Jenkins over his daughter; who, when she executed the deed, was twenty-three years of age, and was, at the time, *well
*243] acquainted with her rights, and with the value of the property. On the trial, it was admitted, that no undue influence was exercised by the father; and it was in evidence, that when the deed was recorded, George Jenkins gave to his daughter $2000 in bank-stock. This, and the further consideration that the daughter was to receive a proportionate part of her father's estate (who in addition to the property conveyed by the deed, was wealthy, and the estate conveyed being such as required large expenses for its preservation and improvement), were asserted to be a valuable consideration for the deed.

The circuit court decreed the deed to be null and void; because the same was made without "any consideration," and because the same was obtained "soon after the minority of said Eleanor, and while she yet remained under his power and control, and uninformed of the nature and extent of her rights;" and decreed also, that one of the appellants, John J. Jenkins, as administrator aforesaid, should pay $3677.01, being a balance due, after deducting $2000, paid on the 3d of November 1813, with interest from 8th of April 1831, on account of money received for sales of part of said property; and also, the sum of $1167.05, amount of rents alleged to have been received since the death of the said George Jenkins; and also,

the sum of $18.25, with interest from said 8th of April 1831, which had been received by George Jenkins on the partition of the estate, for owelty of partition, awarded in 1797. The defendants appealed to this court.

The case was argued by *Robert I. Brent* and *Jones*, for the appellants; and by *Simmes* and *Coxe*, for the appellees.

Brent contended:—1. That there could be no resulting trust, as charged in the bill; because that doctrine is confined to cases where the trust results to a purchaser taking a conveyance in the name of a third person, or similar cases. 2 Atk. 256; 2 Madd. Chan. Pract. 113; 4 Kent's Com. (ed. 1832) 305.

2. The bill takes the alternative ground, in case the resulting trust fails, that the deed of March 1813, executed by Eleanor Jenkins (the daughter) to George Jenkins (the father), was obtained by the undue influence of parental authority. *The answer of the defendants positively denies the charge of undue influence; and this denial is conclusive, to negative the charge, in the absence of all other testimony. The case of the complainants stands alone on the broad and naked principle, that all transactions or dealings between parent and child, by which a benefit passes to the former, is interdicted, *ipso facto*, by the policy of the law. We deny that such is the settled rule of law, and confidently assert, that in every adjudged case there was some circumstance of undue influence proved, and required by the court as a material ingredient. *Huguenin* v. *Baseley*, 14 Ves. 291; 2 Atk. 254, 258; 1 P. Wms. 607; Ibid. 639; 1 Atk. 402; 2 Ibid. 85; Ibid. 160; 1 Madd. Chan. Pract. 309; *Green* v. *Green*, 1 Bro. P. C. 143; *Lewis* v. *Pead*, 1 Ves. jr. 19; *Pratt* v. *Barker*, 1 Simons 1; *King* v. *Hamlet*, 2 Mylne & Keene 474, 480; Pothier, Oblig. (old edit.) 22. [*244

3. Admitting that this deed was purely voluntary, an absolute gift of all the property, by a daughter, twenty-three years of age, to her father; still the conveyance ought to be sustained, because it may have been the true interest of Eleanor Jenkins to place herself on the same footing with her brother and sister by a different mother; her father was a man of large fortune, and it might be greatly to her benefit, to divest herself of her remote reversion, and come in, share and share alike, with her brother and sister. At all events, such a sentlement would be reasonable and just towards her half-brother and sister; and on that ground alone, would be valid. 1 Atk. 5–6.

4. Whatever may have been the abuse of parental authority by George Jenkins in procuring the deed of March 1813; the equity of the complainants is lost by the lapse of time (nineteen years) and the circumstances of the case. On this point, it appears, that Eleanor Jenkins was not married for two years after the date of the deed; and that she lived several years after her intermarriage with James Pye (the next friend of the infant complainants); that George Jenkins lived until 1831; and that not a word of complaint against the fairness of the deed of March 1813, was ever uttered, in the lifetime of either of the original parties to that deed. The court would make wild work, to unravel the transaction, under such circumstances. *Brown* v. *Carter*, 5 Ves. 875, 879; 17 Ibid. 97, 100; 1 Jac. & Walk. 63.

5. But conceding all previous propositions, it appears, that $2000 *was paid by George Jenkins to Eleanor Jenkins, on the 3d November [*245

1813, the day of recording the deed; this was a full and adequate consideration for the reversion dependent on a robust life, and considering the dilapidated situation of the property. And it farther appears, that George Jenkins applied $1000 to the education of Sarah M. Pye (one of the complainants); these facts prove the consideration paid, and to be paid, for the purchase of Eleanor Jenkins's reversionary interest.

6. On the hypothesis, that the deed of March 1813, is to be annulled, then the court below erred, in not allowing the appellants, interest on the sum of $2000 paid to Eleanor Jenkins, on the 3d of November 1813; and in not crediting George Jenkins's estate with the advances made by him to the children of Eleanor Jenkins; and which could not be considered in the light of donations, if this deed is pronounced invalid. *Slocum* v. *Marshall*, 2 W. C. C. 401.

7. The court erred in charging George Jenkins's estate with a sum of money paid him in 1797, in right of his wife (the mother of Eleanor Jenkins) for owelty of partition; because, first, the bill did not claim it 9 Cranch 19; second, the husband was entitled to the money as personalty, not realty. 1 Harr. & Gill 277.

Jones stated, that there was nothing in this case, upon the bill, answer and evidence, but the case of a daughter, of full age, having conveyed her residuary interest in her estate to her father; he having an intermediate estate for life in the property, as a tenant by the curtesy. At the time of the conveyance, he was in full life and health; and he actually lived eighteen years after the conveyance was made. There is no allegation of undue parental influence. This is disclaimed; and the high character of the father forbids such a belief. The father appropriated $2000 of stock to the benefit of the daughter, on the day the conveyance was recorded; which amount he received from the sale, in fee-simple, of a part of the estate, which was, at the same time, sold for $3000.

If the deed is to be set aside, it will be on the principle that such a conveyance by a daughter to a father cannot be made. That the relations of a child to a parent are such, as to forbid her the exercise of a fair and just discretion and judgment; and that a court of chancery *will presume all such conveyances fraudulent, and will avoid them. Mr. Jones denied, that such principles were just to the relations of a parent to a child; and he denied, that any such rule had been established by the decisions of courts of chancery. No case had been cited, and none could be found, in which the mere fact of such a conveyance furnished a ground to vacate it. In all the cases, there had been other matters, which satisfied the chancellor that the deed should be avoided.

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The presumption should be in favor of such a transaction as that before the court. It was between a father and his child; between one who had every inducement, from nature and from duty, to take care of and protect and promote the interests of his child. Would the court, against these bonds of union, against the influence of a relationship which should be believed to operate only for the benefit of the child, infer the violation of every duty, and believe that all these feelings were disregarded? Would they apply a rule to such a case, which could have had no origin but in a bosom devoid of every affection which should prevail in it? A court of chancery,

to adopt such principles, must disregard the best and the most influential sympathies and affections of our nature; and must look at man as wanting in all that ornaments and dignifies him.

Semmes, for the appellees, after fully stating the facts, regretted that his absence from the court during the opening argument of the counsel for the appellants, on the previous day, would limit his remarks to a consideration of the causes of error assigned by the appellants in their printed brief. These assignments of error he would, however, take up *seriatim*; and felt confident that an investigation of them would disclose the whole merits of the controversy, both on the law and the facts. The appellants contend, that the decree ought to be reversed for the following reasons:

1. That the court below erred in refusing to allow the appellants to amend their answer, upon newly-discovered evidence, so as to plead the fact of a valuable consideration having been paid for the property conveyed in the deed, in order to let in proof of the same. The prayer of the petition was properly refused. It was made *after* the hearing—after the court had pronounced their opinion in the case, and were about proceeding to enter a final decree. Petitions *to amend the pleadings, both at law and in equity, are addressed to the sound discretion of the court; when that [*247 discretion has once been exercised, it is absolute, and admits of no question. A refusal to permit such amendment can never be assigned as error in an appellate court. Were the action of the court below subject to such revision, it would cease to have a discretion in the matter. Amendments in an answer will never be permitted after the hearing. Cited, 1 Harr. Chan. Pract. 226, *et seq.*; *Rawlins* v. *Powell*, 1 P. Wms. 292; *Calloway* v. *Dobson*, 1 Brock. 119.

But the petition was rightfully refused, on the face of it. It does not allege the discovery of new evidence; but is, in truth, a prayer to amend, that a new version may be given to a fact already before the court, and on which they had judicially passed. The amendment desired was, that they might allege a transfer of $2000 in bank-stock, made November 3d, 1813, to be the consideration of the deed executed on March 15th, 1813. It was a petition for a new argument on a state of facts already considered by the court. The answer of Jenkins had alleged the transfer of large amounts of bank-stock; the report of the master commissioner, and the certificate of the bank clerk, had ascertained that amount to have been the $2000 in question; this was then before the court; was claimed as an off-set in the court below, by the appellants; and when, two years after the commissioner's report, the court were about proceeding to a final decree, this petition was put in for an amendment, by which a fact so well known might be wrested to a purpose that the zealous defence of the appellants below had never until that moment contemplated. This transfer of bank-stock, which can never be admitted as the consideration of the deed from Eleanor to her father, will assume a more important aspect, in considering the next cause of error in the appellant's brief.

The petition was, moreover, defective in a material point. While it alleged that this bank-stock was the consideration of the deed, and prayed the amendment, to let in proof of that fact; it did not allege the existence of evidence to substantiate the position, nor show a probable case to the

court that such was likely to be proven. The petition to amend was, under all the circumstances, properly refused.

2. The next cause of error is, that said deed does not operate as a resulting trust, as charged in this case. Although it is perfectly competent for the appellees to insist, that *in this case a trust did technically result to the grantor and her heirs, yet they do not consider it necessary to rely on that point. That such trust, on the facts of this case, would have resulted: cited, 2 Story's Equity, § 440. The facts show that the original parties to the deed must have contemplated a trust. The $2000 now sought to be made the consideration of the deed, was part of the larger sum of $3000; for which one of the lots, covered by it, was sold, a few days before, to Harper & Davis. Here was a direct application by the grantee, to the use of the grantor, of part of the proceeds of the property. It was a direct recognition of the implied trust, by George Jenkins; and alone would warrant the inference that such was the contemplation of the parties. But this point in the appellants' brief, as well as the next, which is—

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3. That there was no "undue influence" used, as charged in this case; and that the evidence upon this point, so far as it goes, shows the reverse, may be properly included under the fourth; which is the only material question presented by the record. It may be as well, however, here to remark, that the appellees do not rely on any allegation of *actual* "undue influence;" they do not impugn the validity of this deed, on any charge of *actual* fraud. The grounds on which they contend for its nullity, will be presently considered. The answer of Jenkins is conclusive as to the point of restraint and coercion. Being responsive to the bill, and uncontradicted by testimony, it disposes of that question. The appellees, then, must resort to higher and sterner principles of equity jurisprudence to sustain their case.

4. The next, and only important, point made by the appellants, is, that said deed is valid, both in law and in equity. No doctrine of the law is more firmly established, or more frequently acted on by courts of equity, than that all agreements, contracts and conveyances procured by fraud, imposition or undue influence, are null and void. As the rule is imperative, where actual fraud is established; so is it equally binding, when the circumstances of the case, or the relations subsisting between the parties, are such as to raise the presumption of implied fraud, or to warrant the inference that one of the contracting parties might have been subjected to oppression or undue influence. The rule may appear arbitrary and unjust, at first sight, as calculated to impair the free exercise of *volition in persons competent to contract; and as having a tendency to destroy vested rights, and operate injuriously on innocent third persons. Correctly viewed, however, it will not appear obnoxious to such objections. The policy of the law must lay out and define certain general principles, as guides of action, and rules for construing all instruments and agreements.

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Another broad department of equity jurisdiction is comprised in the protection it holds out to parties whom the law does not consider as altogether *sui juris*, in respect to the exercise of proprietary rights; or as liable to be influenced by circumstances peculiar to their age, capacity or situation. Protecting weak and incapacitated persons from the effects of their own injudicious contracts, it well becomes the jealous spirit of the courts to

have marked out certain social relations as peculiarly subjects to suspicion and caution, in respect to all agreements between persons affected by considerations or motives arising out of the relationship in question. Where one party is not perfectly free to act, and the other party has availed himself of his power and influence, in procuring a conveyance or contract, courts of equity dispense with proof of actual fraud or imposition; but inferring constraint from the relations of the parties, will set aside such contract or conveyance, as contrary to public policy. In all cases, the *onus probandi* is on the party setting up such contract, to show an adequate consideration, and the *bonâ fide* character of the transaction. The relations between guardian and ward, parent and child, solicitor or attorney and client, trustee and *cestui que trust*, master and servant, and the cases of expectant heirs, and of reversioners, are jealously watched; and all contracts made during its existence, by the minor party, in each of these relations, to the superior, are scrutinized jealously; and in some cases, on bare suspicion of undue influence; in others, on the mere relation of the parties, fraud is inferred; and the contract or conveyance set aside. Contracts made soon after the termination of such relations, are, on the same principle of policy, subjected to the operation of the same wholesome rule. Nor will lapse of time, or the death of the fraudulent purchaser, so affect the case as to preclude the grantor, and those claiming under him, from setting aside the contract. Authorities cited, *Morse* v. *Royal*, 12 Ves. 371; *Wright* v. *Proud*, 13 Ibid. 137; *Murray* v. *Palmer*, 2 Sch. & Lef. 474; *Osmond* v. *Fitzroy*, 3 P. Wms. 131; *Huguenin* v. *Baseley*, 14 Ves. *273; 2 Eden 286; *Rhodes* v. *Cook*, 2 Sim. & Stu. 448; *Davis* v. *Duke of Marlborough*, [*250 2 Swanst. 139; *Gowland* v. *De Faria*, 17 Ves. 20; *Peacock* v. *Evans*, 16 Ibid. 512; *Evans* v. *Llewellen*, 1 Cox 333; s. c. 2 Bro. C. C. 120; *Gwynne* v. *Heaton*, 1 Ibid. 1; *Bell* v. *Howard*, 9 Mod. 302; *Young* v. *Peachy*, 2 Atk. 254, and the case of *Glissen* v. *Ogden*, therein referred to; *Heron* v. *Heron*, 2 Atk. 160; *Blunden* v. *Barker*, 1 P. Wms. 639; s. c. 10 Mod. 451; *Broderick* v. *Broderick*, 1 P. Wms. 239; *Scrope* v. *Offley*, 1 Bro. P. C. 276; *Gould* v. *Okeden*, 4 Ibid. 198; *Twisleton* v. *Griffith*, 1 P. Wms. 310; Jeremy's Equity 394, *et seq.*; 1 Story's Equity, § 304–24, inclusive; and *Waller* v. *Armistead's Administrators*, 2 Leigh 11.

The case at bar is one peculiarly calling for the application of the principles recognised and established by the authorities cited. The case is that of a deed, made without consideration, from a young daughter, not twenty-three years of age, to her wealthy father, with whom she resided; conveying all her property. Her father was tenant by the curtesy, and held the particular life-estate; her estate was the reversion descended to her from her mother, and dependent thereon. She was, then, both under the parental influence, and presented the case of a young heir dealing for an expectancy with a party owning the particular estate, for no consideration, and with no declaration of trust; a party whose position peculiarly subjected the present contract to the implication of fraud, or the suspicion of imposition.

The ground assumed by the appellants, that this is a voluntary deed, and therefore, good against the grantor, and all claiming under her, cannot, on this aspect of the case, be maintained. The general principle introduced by the statutes 13 and 27 Eliz., re-enacted in most of the states, that voluntary deeds, so far only as existing creditors and subsequent *bonâ fide* and

unnoticed purchasers are concerned, are void, is admitted by law. The exception which the courts imply from the terms of the statute, and the usual motive to defraud creditors, in all such conveyances, as against the grantor and his sub-claimants, seeking to recover the property, or vacate the conveyance, is the sole exception to this general rule. A party who has conveyed away his property, to evade the payment of his just debts, shall not be permitted to take advantage of his own wrong, and reclaim his property, against the will of his grantee, the partner in the fraud; when the claims of creditors may have been otherwise satisfied,
*251] *or a necessity for their interference has passed away. This principle, with that other plain rule, giving any party competent to contract, and uninfluenced by fraud, duress or undue advantages taken by the grantee, a free disposition over his property, cannot be applied to the present case. A voluntary deed, to be good, must be made *ceteris paribus*. If the party grantor be an infant, lunatic, or subjected to the operation of those relations so jealously watched by courts of equity; in some cases, from the absolute nullity of the contract; in others, on the principles of public policy; that contract will be set aside. By a voluntary deed, is meant a gift without consideration; would, then, a voluntary deed, executed under duress, be sustained? The relation of the parties assimilates the present deed to one obtained by actual fraud or undue influence.

The remaining causes of error were in reference to improper items in the master commissioner's account; questions as to the effect of evidence; the allowance of interest and costs; and the right to credits in the nature of off-sets. Though material to the merits, the discussion of these points is not of sufficient general importance to be set out in the argument.

Thompson, Justice, delivered the opinion of the court.—This case comes up on appeal from the circuit court of the district of Columbia, for the county of Alexandria. The appellees were the complainants in the court below; and as heirs-at-law of their mother, Eleanor Jenkins, filed their bill, by their father, James B. Pye, as next friend, to set aside a deed given by their mother to George Jenkins, her father, bearing date the 15th of March 1813. The bill charges, that the deed was made wholly without consideration, and operated only to create a resulting trust in favor of the grantor and her heirs; and if their claim cannot be sustained on that ground, they charge that the deed was obtained by the undue influence of parental authority, and therefore, void in equity, against the said Eleanor Jenkins and her heirs.

The consideration expressed in the deed is one dollar; and as to the allegation of undue influence, the bill charges, that the said Eleanor inherited, as heir of her mother, the land conveyed to her father, and in which her father was entitled to a life-estate. That at the time of the mother's death, she was an infant of very tender years, residing with her father, and continued to reside with him until her marriage. That she never was informed
*252] of the extent of *her property, to which she became entitled on the death of her mother; and having led a life of great seclusion, in the country, at a distance from Alexandria, where the lands are situated, she had no means of acquiring information on the subject. That very soon after the said Eleanor had attained the age of twenty-one years, and whilst she

still resided with her father, and remained ignorant of the extent and value of her rights; the said George Jenkins, availing himself of his parental authority, and of the habit of implicit obedience and submission on the part of his child, procured from her the deed in question.

The answers of the appellants deny every material charge and specification in the bill, tending to show that any undue influence was exercised by the father, to obtain the deed from his daughter; but that the act was voluntary and free on her part. That she was well acquainted with her rights, and the value of the property. That at the time of executing the deed, she was twenty-three years of age; and that the same was not done in expectation of her marriage, as she was not married for two years afterwards.

The mere nominal consideration expressed on the face of the deed was enough to pass the estate to the grantee, no uses being declared in the deed. It is true, as a general proposition, that he who pays the consideration, means, in the absence of all rebutting circumstances, to purchase for his own benefit; and there may be a resulting trust for the use of the party paying the consideration. But this is founded upon a mere implication of law, and may be rebutted by evidence, showing that such was not the intention of the parties. And in the present case, the evidence is conclusive, to show that no such resulting use was intended. But it is unnecessary particularly to notice this evidence, as this part of the case was not very much pressed at the argument. And in addition to this, the evidence shows, that on the 3d of November 1813, the day her deed was offered for record in Alexandria, George Jenkins paid to his daughter $2000; which, under the situation of the property, might well be considered nearly, if not quite, an adequate consideration. The property being in a dilapidated state, requiring great expense in repairs; and the grantee, George Jenkins, having a life-estate in it, which, from the circumstance of his living eighteen years after the date of the deed, there is reason to conclude, that the state of his health and constitution was such, at that time, as justly to estimate his life-estate of considerable value.

*The evidence of the payment $2000, in addition to the nominal consideration of one dollar mentioned in the deed, was admissible, [*253 without any amendment of the answer. It rebutted the allegation in the bill, that the deed was made wholly without consideration.

But the grounds mainly relied upon to invalidate the deed, were, that being from a daughter to her father, rendered it, at least, *primâ facie* void. And if not void on this ground, it was so, because it was obtained by the undue influence of parental authority. The first ground of objection seeks to establish the broad principle, that a deed from a child to a parent, conveying the real estate of the child, ought, upon considerations of public policy, growing out of the relation of the parties, to be deemed void; and numerous cases in the English chancery have been referred to, which are supposed to establish this principle. We do not deem it necessary to travel over all these authorities; we have looked into the leading cases, and cannot discover anything to warrant the broad and unqualified doctrine contended for on the part of the appellees. All the cases are accompanied with some ingredient, showing undue influence exercised by the parent, operating upon the fears or hopes of the child; and sufficient to show reasonable grounds to presume, that the act was not perfectly free and voluntary on

the part of the child; and in some cases, although there may be circumstances tending, in some small degree, to show undue influence, yet if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed.

It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject, for should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle contended for, that the deed of a child to a parent is to be deemed, *primâ facie*, void. It is, undoubtedly, the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship; is assuming a principle at war with all filial as well as parental duty and affection; and acting on the presumption, that *254] a parent, instead of wishing to promote the interest *and welfare, would be seeking to overreach and defraud his child, Whereas, the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. Such a presumption harmonizes with the moral obligations of a parent to provide for his child; and is founded upon the same benign principle that governs cases of purchases made by parents in the name of a child. The *primâ facie* presumption is, that it was intended as an advancement to the child, and so not falling within the principle of a resulting trust. The natural and reasonable presumption, in all transactions of this kind, is, that a benefit was intended the child, because in the discharge of a moral and parental duty. And the interest of the child is abundantly guarded and protected, by keeping a watchful eye over the transaction, to see that no undue influence was brought to bear upon it.

In the present case, every allegation in the bill tending to show that any undue influence was used, is fully met and denied in the answer, and is utterly without proof to sustain it. And, indeed, this allegation seemed to be abandoned on the argument. But if anything was wanting to resist the claim on the part of the appellees, and to establish the deed, and the interest derived under it, it will be found in the lapse of time. The deed bears date the 3d of November 1813; the grantor, Eleanor Jenkins, then being twenty-three years of age. She was married about two years thereafter, and died in the year 1818; and not a whisper of complaint was heard against the transaction, during her lifetime. George Jenkins, the grantee, lived until the year 1831, and no complaint was made in his lifetime; after a lapse of eighteen years, it is difficult, if not impracticable, fully to explain the transaction. Lapse of time, and the death of the parties to the deed, have always been considered, in a court of chancery, entitled to great weight, and almost controlling circumstances, in cases of this kind.

But the circumstances, as disclosed by the proofs, not only rebut every presumption of unfairness on the part of George Jenkins, but disclose circumstances, tending to show that he was governed by motives highly honorable and commendable. He was a man of large estate; the property conveyed to him by his daughter was in a dilapidated and unprofitable con-

dition. He had a life-estate in it. And it would have been unreasonable, if not unjust to his other children, to *have required him to incur great expenses in improving this property, which would inure to the exclusive benefit of this daughter. His object, as well as that of his daughter, seems to have been, to enable him the more easily and satisfactorily to make an equal distribution of his property among all his children; as well the said Eleanor, as those he had by a second marriage. This was a measure well calculated to promote harmony among his children; and his intention to carry that disposition of his property into execution, was manifested by the will he made; which failed, however, of its full operation, by reason of some informality in its execution. But the appellees have succeeded to a full and equal share of his estate, under the distribution which the law has made; which is all that in equity and justice they could claim. [*255

This view of the case, renders it unnecessary to notice the points made on the argument, in relation to the accounts which the appellees were called upon to render. The decree of the court below is accordingly reversed, and the bill dismissed.

CATRON, Justice.—I concur with the majority of the court, that the decree be reversed; but, differing most materially with the reasons and principles on which the opinion of my brethren proceeds, I will briefly state the difference, hoping sincerely I may be mistaken.

The cause must be reviewed here, in the same form that the parties presented it to the circuit court; this is due to the court below, and the only mode we can pursue as a court of appeals. The bill was filed in July 1833; the answer, in May 1834; the replication, in April 1835; and on the 11th of May, the cause was, by agreement, set for hearing; and on the 26th of October 1835, was heard upon the bill and answers, with two additional facts, which the parties admitted of record, to wit: 1. That George Jenkins was, at the date of the deed from his daughter to him, in 1813, a man of large fortune, and so continued till his death. 2. That the deed conveyed all the estate to which the said Eleanor was in any manner entitled. Upon this case, the court, on the 26th of October 1835, decreed for the complainants; and ordered an account to be taken of the rents of the property in litigation, since George Jenkins's death, the parcels sold by him in his lifetime, and the value of the estate in 1813, &c. *On the 13th of May 1837, the master commissioner reported; and on the 31st of October 1837, the report was confirmed by a final decree of the court. Upon this proceeding, it will be remarked, that the decree of October 1835, could not be reversed by that of 1837, on evidence furnished to the commissioner in taking the account, and which he reported to the court. The first decree could only have been reached by a petition for a rehearing (if filed in time) or by a bill of review; and we must, therefore, examine the decree of 1835, on the facts then presented to the circuit court. [*256

The bill alleges the conveyance of 1813 to have been executed without any valuable consideration; and that the daughter acted under the influence of parental authority. That it was executed without valuable consideration, the answers admit; but they deny that any constraint or parental authority was exercised, and respond, that the deed was made freely and voluntarily. They also admit, that Eleanor Jenkins was born the 17th September 1790;

that her mother died in 1796 ; that when the deed was made, Eleanor was only eighteen months over twenty-one years of age, and that she was the sole heir of her mother ; the father and grantee being tenant by the curtesy of the lands descended. That George Jenkins had two other children, by a different mother, who are the defendants ; and that he died in 1831, intestate as regarded his real estate. Eleanor Jenkins married in 1815, and died in 1818 ; leaving the complainants her heirs.

It is also averred in the answers, that the property, in 1813, was in a dilapidated condition ; and that it had suffered by fire, which was a principal reason for making the conveyance. The averment is independent of any statement in the bill, is traversed by the replication ; and no proof having been made to sustain the averment, of course, it cannot be noticed here. The defendants also insist, that the bill should be dismissed, because of the lapse of time, and the death of parties and witnesses.

This being the case presented to the circuit court, in 1835, the question is, did that court err in ordering the defendants to account? Time and the death of George Jenkins aside, I think it impossible so to hold, consistently with the best established doctrines governing a court of chancery. The elements of the decree below were : 1. That the grantor, Eleanor Jenkins, was a young heir, and a woman, when she made *the conveyance ; that it was of her whole estate, without consideration, and to a parent of large wealth. 2. That she was an heir of an estate in reversion, which descended to her in tender infancy ; and in regard to the possession and enjoyment of which she must be deemed and treated, in a court of chancery, as an expectant heir. 3. She conveyed to the adult tenant for life, who was her father and natural guardian, with whom she resided, and on whom she was dependent. I propose to examine the cause, such as it is found ; not to speculate upon supposed cases of remainders acquired by purchase, and sold by him who thus acquired ; nor upon cases where the tenant for life joins in the sale. These and other transfers of remainders, may depend on very different principles from the case before the court.

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The first two grounds, governing the decision of the circuit court, will be treated together ; disregarding for the present the relation of father and daughter. In the language of Sir William Grant, in *Gowland* v. *De Furia*, 17 Ves. 23, it will be laid down, that "this is the case of a person who, in this court, is considered as an expectant heir ;" and "that it is incumbent upon those who have dealt with an expectant heir, relative to his reversionary interest, to make good the bargain ; that is, to be able to show that a full and adequate consideration was paid. In all such cases, the issue is upon the adequacy of price ; no proof of fraud is necessary ; and the relief is given upon general principles of mischief to the public, without requiring particular evidence of actual imposition." 2 Atk. 28 ; Jeremy's Eq. 398 ; 1 Story's Eq. 330, § 338 ; 1 Fonbl. Eq. b. 1, ch. 2, § 12 ; 1 Madd. Ch. 118, state the result of the adjudications.

As some doubts are suggested by Mr. Justice Story, and by Mr. Jeremy, in the passages cited of their treatises, whether the strictness of the doctrine applies to cases of dealings for remainders ; it is deemed necessary to go into a slight review of the leading adjudged cases, to see if any conveyance resembling the present has been permitted to stand. It is but justice, however, to say, that I do not suppose either of those highly respectable authors

intended to question the doctrine, in a case like the present; where the estate in reversion descended upon an infant heir, incumbered with a life-interest, and the expectance was given to the tenant for life, within eighteen months after the heir came of age. That such purchase is *a constructive fraud, and the purchaser, if a stranger, compelled to an account and [*258 give up his bargain, if found to be advantageous; has not, for a century, been an open question. The conveyance is treated as a mortgage, and the grantor relieved, on payment of the principal advanced and interest; without inquiry whether there was fraud or imposition.

The doctrine, during the seventeenth century, met with some opposition, especially in the reigns of Car. II. and Jac. II.; but in *Nott* v. *Hill*, 1 Vern. 167; 1 P. Wms. 310; Newland on Contracts 436; and *Berney* v. *Pitt*, 2 Vern. 14, it received the most conclusive confirmation short of the judgment of the house of lords. In the former case, Lord Ch. NOTTINGHAM decreed redemption (in his own phrase); on rehearing, Lord Keeper NORTH reversed this decree, and refused relief; but this last decree was again reheard before Lord Ch. JEFFREYS, 2 Vern. 27, and reversed, and that of Lord NOTTINGHAM confirmed. So, in *Berney* v. *Pitt* (the report of which is found in 2 Vern. 14; 1 P. Wms. 311; Newland, Cont. 347), Lord NOTTINGHAM denied relief; but Lord Ch. JEFFREYS (2 Jac. II.), on rehearing, reversed the decree, and let in the grantor to redeem, on the usual terms of paying the money advanced, with interest. In the case of *Twistleton* v. *Griffith* (1716), the exception was again invoked, that there was no fraud in fact; it was urged, that at this rate, the heir of the remainder could not sell, as no one would buy; to which Lord COWPER replied, "this might force an heir to go home, and submit to his father, or bite on the bridle, and endure some hardships; and in the meantime, he might grow wiser, and be reclaimed." 1 P. Wms. 313.

In *Peacock* v. *Evans*, 16 Ves. 514, the master of the rolls says (when speaking of an heir selling the expectancy of a remainder, during his father's life): "To that class of persons, this court seems to have extended a degree of protection approaching nearly to an incapacity to bind themselves by contract;" and he cites with approbation the expression of Lord Ch. ELDON, in *Coles* v. *Trecothick*, 9 Ves. 234; that, "the cases of reversions and interests of that sort go upon a very different principle; in some, the whole duty of making good the bargain, upon the principles of this court, is upon the vendee, as in the instance of heirs expectant." And Sir WILLIAM GRANT added, "the tendency of this doctrine to render all bargains with such persons very insecure, if not altogether impracticable, seems not to have been considered as operating to prevent its adoption and *establishment; but, on the contrary, some of the judges have allowed that probable [*259 consequence, as being to them the recommendation of the doctrine." In the case referred to, it was admitted, there was nothing approaching to fraud or imposition; yet the conveyance was set aside, because a full price had not been paid. All that could be said of it was, that Mr. Peacock had obtained a very advantageous bargain.

So, in *Gowland* v. *De Faria*, 17 Ves. 23, where a reversionary interest had been sold, in which the plaintiff's mother had a life-estate, all fraud was denied; and no proof introduced, save that the consideration was not full; and in reply to the argument of manifest fairness, the master of the

rolls replied, "In all these cases the issue is on the inadequacy of price; this is the case of a person who, in this court, is considered an expectant heir; he has charged his reversionary interest; and the question is, whether he has received an adequate consideration? upon that question, the evidence is all one way:" and the conveyance was treated as a mortgage. See *Davis* v. *Duke of Marlborough*, 2 Swanst. 147. To cite other authorities to sustain the position assumed, would justly be deemed an incumbrance; and I will only ask, had Eleanor Jenkins conveyed to a stranger, instead of her father, could a court of chancery have refused her heirs relief, had they come in time?

And, by way of introducing the next proposition, it will be submitted, whether her father stood upon higher ground than a stranger? To a proper understanding of this question, a slight reference must be had to the facts reported by the commissioner, as they appeared on the final decree, in October 1837. My brethren have given them some consideration, nor will I pass them by; although the pleadings, it is apprehended, exclude them, they will be taken in connection with the answers and admissions.

George Jenkins, in 1813, and at his death, was a man of large wealth; he had two sets of children; one child by a first wife, and two by a second. The answer avers he procured the conveyance to do justice in his family; the account shows, that Eleanor's and George Jenkins's joint interests were worth, when the deed was made, in March 1813, $8992.97; and that about six months after the execution of the deed, George Jenkins caused to be vested in his daughter, Eleanor, $2000 worth of bank-stock; which was sold by Mr. Pye, shortly after he married Eleanor; further than this, nothing was advanced to the daughter. George *Jenkins died intes- *260] tate, as regarded his lands; whether by accident or design, matters nothing to the infant children who are plaintiffs. The answer avers, that the complainants, by the intestacy, are entitled to two-elevenths of their grandfather's estate; whereas, were they to obtain the lands conveyed by the deed of 1813, and come in as joint-heirs of the residue, they would take more than one-half. What advances were made by their father to the two children of George Jenkins, who are defendants, does not appear; but that they take nine-elevenths of the whole estate, by the intestacy, conclusively proves, if George Jenkins obtained the deed, "best to enable him to do equal justice to all his family," that he did no such equal justice to his daughter Eleanor, in her life-time, or to her children at his death. He was a man of large wealth, and was bound to do equal justice, if the answer be true; and the defendants aver, they personally know the fact to be so; and that this was the consideration of the conveyance. If it was obtained for one purpose, and the property applied to another; for instance, to advance the fortunes of the second set of children; it is well settled, the deed should be set aside. To prove it, I need only cite the case of *Young* v. *Peachy*, 2 Atk. 254, whose authority has never been questioned since Lord HARDWICKE's time.

Again, $2000 in bank-stock was a poor advance for a man of large wealth, having only three children, on the intermarriage of one of them; and we will take it, that Eleanor was not intended to be turned off destitute. The facts thus introduced from the commissioner's report, to control the effect of the first decree (could they be heard for such purpose), are

therefore, of no value, and cannot help the conveyance. How then did the father stand?

The jealousy with which courts of chancery watch contracts made by parents with children, is laid down with terseness and much accuracy by Mr. Justice Story, in his lecture on constructive frauds. 1 Story's Eq. 306. He says, "the natural and just influence which a parent has over a child, renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore, all contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy; and if they are not reasonable under the circumstances, they will be set aside." Mr. Newland, in his Treatise on Contracts, ch. 30, p. 445, gives the result of the authorities, with great clearness and force; and *the accuracy of which is fully borne out by the cases. "It is a natural presumption," says he, "that a parent possesses influence [*261 over the mind of his child. Equity, therefore, regards with a jealous eye contracts between them; and very properly considers this relation to give additional weight and suspicion to circumstances of fraudulent aspect, which the case may involve." And Lord HARDWICKE said, in *Young* v. *Peachy*, 2 Atk. 258, where the transaction in its leading features much resembled this (the father having obtained a voluntary conveyance from a daughter): "But the case is greatly strengthened, when it comes to be considered, that this was a recovery obtained by a father from his child; and when this is the case, it affords another strong circumstance in order to relieve the plaintiffs."

The British adjudications uniformly and firmly supporting the doctrine, are cited by the writers above referred to (1 Story's Eq. 306; Newl. 445; Madd. Chan. 310); and with which I will rest content; adding, however that the case before us, is as bare of alleviating circumstances, tending to exempt it from the general rule, as any I have found reported, or known in my experience in life. Had the conveyance been made to a stranger, it could not have been tolerated for a moment; and having been made to the father, in the language of Mr. Newland, "the relation gives additional weight and suspicion to the circumstances which the case involves." Its decision rests not on discretion, but on settled rules of property; which, it is supposed by me, should not be disturbed.

But, first, more than twenty years elapsed from the execution of the conveyance, to the time of filing the bill; and second, it was not filed until after George Jenkins's death. The daughter and her heirs having been at all times since 1813, free to sue; and having had the means, and being under no undue restraint, the presumption is, that time has destroyed the evidence going to prove the fairness of the transaction; or that if the suit had been brought in the grantee's lifetime, he could have adduced it. I confess, however, it is with some difficulty the presumption can be maintained, under the circumstances of this cause, by the British adjudications; yet, our migratory habits, and the consequent loss of evidence, are such, that presumptions founded on time must, in this country, be firmly supported, without letting in doubtful exceptions to destroy their force: especially, when those in whose knowledge the facts rested, which might have explained the transaction, are dead: as in *Brown* v. *Carter*, 5 Ves. 875, where the bill was brought to set aside a settlement under *an agreement between father [*262

and son, made in 1769; the conveyance was voluntary, as in the instance before the court; the father died in 1793; up to which time no complaint had been made; and very soon after, the bill was filed. The court held, that, "though transactions of this kind will be looked at with jealousy, that the father should not take an improper advantage of his authority; the complaint must always be made in time; not after the father is dead," &c. The same doctrine was held by Lord ERSKINE, in *Morse* v. *Royal*, 12 Ves. 376; and relief refused, because of the lapse of time and the death of witnesses. The British case, however, which has most labored this question, is that of *Chalmers* v. *Bradby*, 1 Jac. & Walk. 58; in which the authorities are referred to, where the claims of expectant heirs to have decrees for accounts, and the rescission of contracts, were rejected, because of the lapse of time intervening between the date of the contract and the filing of the bill.

The general doctrine, that full force will be given to presumptions founded on time, and that stale demands will not be enforced, to compel parties to account, nor to disturb contracts or possessions, is established on a very firm footing, as the doctrine of this court, in *Ricard* v. *Williams*, 7 Wheat. 59; *Hughes* v. *Edwards*, 9 Ibid. 489; *Willison* v. *Watkins*, 3 Pet. 43; *Miller* v. *McIntyre*, 6 Ibid. 61; *Piatt* v. *Vattier*, 9 Ibid. 405; and other decisions. But the difficulty in such cases as the one before the court is, that the expectant heir is usually destitute, ignorant of his rights, and not on an equal footing with his vendee; and the courts of chancery presume, that he contracted in subservience to circumstances either of helpless poverty or ignorance; or, at least, superior knowledge of facts on part of him with whom he contracted. When the facts proved are in accordance with the presumption, and establish that the same condition continued to the date when suit was brought, time has not been strictly regarded in England; and chancery has frequently proceeded to afford relief, disregarding the length of time, upon evidence of a continuing oppression and poverty or concealment. This cause has certainly in it circumstances to raise difficulties. Eleanor Pye married within two years, and died within five after the conveyance was made; and the complainants were, at her death (and so continued until they sued), infants. Yet I think no account should have been ordered, nor the conveyance impeached, after the lapse of twenty
*263] years, *and after George Jenkins's death; and concur that the bill be dismissed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said circuit court, with directions to dismiss the complainants' bill.

*James Galloway, Junior, Appellant, *v.* Henry R. Finley and David Barr, Appellees.

Rescission of contract.—Reformation.—Patent.

C. B., a man resident in Ohio, as an officer in the Virginia line, during the revolutionary war, was entitled to a quantity of military land in the state of Ohio; warrants for the land were issued to him, and were surveyed, located and patented; in 1835, the heirs of C. B. sold pay of these lands to G., who went into possession thereof; he soon afterwards discovered, that the patent for these lands issued after the decease of C. B., and was, consequently, void; the land had been recognised for forty years, as the property of C. B. and his heirs, and the title in them deemed valid; G., on making a discovery of the defects in the patent, entered and located the land for himself: *Held*, that G. could not be permitted to avail himself of this defect in the title, while standing in the relation of a purchaser, to defeat the agreement to purchase, made with the heirs of C. B.; under the most favorable circumstances, he could only have it reformed; and the amount advanced to perfect the title, deducted from the unpaid purchase-money. Where a purchaser, instead of claiming from his vendors the cost of entering and surveying the lands, the defect in the title to which had become known to him through his purchase, claims to hold the land as his own, under the title acquired by his entry or survey, and asks a court of equity to rescind the contract of purchase; the court will decline giving its aid, to obtain the expenses of the warrants and surveys taken out by him for the land, and set up against the rights of his vendors.

It is an established rule in equity, that when a vendor of land has not the power to make a title, the vendee may, before the time of performance, enjoin the payment of the purchase-money until the ability to comply with the agreement is shown; but then, the court will give a reasonable time to procure the title, if it appears probable that it may be procured.

In reforming a contract for the sale of lands, equity treats the purchaser as a trustee for the vendor, because he holds under the vendor; and acts done to benefit the title, by the vendee, when in possession of the lands, inure to the benefit of him under whom the possession was obtained, and through whom the knowledge that a defect in the title existed, was derived. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title.

A patent for lands, issued after the decease of the patentee, passes no title to the lands; there must be a grantee, before the grant can take effect.

The acts of congress of 1807, and the subsequent acts relative to the titles to military lands, were intended to remedy any defects in the patenting the lands in the name of the warrantee, who might have been deceased at the time of the emanation of the patent; and to secure the title to the lands to the heirs of the patentee. The statute is general, including by name all grants, not distinguishing between void and valid; and the plainest rules of property and justice require, that the courts should not introduce an exception, the legislature having made none.[1]

Appeal from the Circuit Court for the Western District of Pennsylvania. *The appellant filed his bill, on the 19th of October 1835, [*265 stating, that on the 11th of March 1835, he entered into an article of agreement with David Barr, acting as attorney for his wife, Elizabeth Julia Ann, who thereby became a party to the same. The agreement stated, that Charles Bradford, late of Pennsylvania, obtained for his services as an officer in the Virginia continental line, a land-warrant, No. 4467, for 2666 acres of land, which was entered, surveyed and patented in three surveys, in the Virginia military district, in Green and Brown counties, in the state of Ohio. That Charles Bradford died intestate, leaving four children, two of whom died without issue, and intestate, leaving Henry R. Finley and Elizabeth

[1] Under the act of 1836, a patent in the name of a deceased person, inures to the benefit of his heirs. Schedda *v.* Sawyer, 4 McLean 181. Davenport *v.* Lamb, 13 Wall. 418. And see, McArthur *v.* Dun, 7 How. 262; Niswanger *v.* Saunders, 1 Wall. 424.

Julia Ann, his only surviving heirs. Elizabeth Julia Ann married John Finley, and died, leaving two children, Henry and Elizabeth Julia Ann, who were the only heirs of their mother, and were entitled to one undivided half of the said military land. That Henry R. Finley, and Elizabeth Julia Ann, the wife of David Barr, sold to the complainant an undivided moiety of the two surveys in Green county, in consideration of an agreement to pay $8000; of which $1000 was paid, and notes given to Henry R. Finley, and to the wife of David Barr, for the residue, payable in equal instalments, in one, two and three years; viz., on the first of January 1837, 1838 and 1839. The defendants, and the wife of Barr, covenanted, that they were the persons they represented themselves to be, and that they were seised and possessed of a good legal title to the lands they sold to the complainant; and bound themselves, their heirs, &c., to make him, his heirs, &c., a good title in fee-simple, as soon as he should pay the purchase-money. That defendants asserted, they had in possession the evidences of the title of defendant Finley, and the wife of Barr, to the land; and that a letter of attorney had been executed and acknowledged by Barr's wife to himself, authorizing him to sell and convey her title in the land; that they had then just discovered, that they had not brought these papers with them, and to induce appellant to close the contract, promised to send him the papers, as soon as they should return home; confiding in the existence of the papers, and the promise to forward them to him, he concluded the agreement. The complainant said, he paid down the $1000 and $104; the latter credited on the last note. That since the date of the contract, Barr's wife had died intestate, and without issue, being a minor at her death. That defendants had not pro-
*266] duced *their title papers nor letter of attorney. That defendants could not perform their contract, nor make a good title to the land, because Charles Bradford died in 1789; and the lands were entered in his name, on the 19th of April 1793; and the tract of 1000 acres was surveyed the 14th of February 1794; and the survey of the tract of 1200 acres, was made the 24th of March 1794; the entries and surveys being made about four years after his death. The complainant, averring his readiness to perform, prayed that the article of agreement might be deemed annulled and cancelled; that the money be refunded, with interest, the notes enjoined, and the collection restrained; and for general relief.

The defendants Finley and Barr, on the 19th of January 1836, answered jointly, admitting the contract as stated in the bill, and that H. R. Finley and Elizabeth Julia Ann Barr, wife of David Barr, were the children and sole heirs of Elizabeth Julia Ann Finley, daughter of Charles Bradford, and entitled, as such, to a moiety of the lands in question; and that they told the appellant they had, in Pennsylvania, evidence that defendant, Finley, and the wife of defendant, Barr, were the heirs of Elizabeth Julia Ann Finley; all which they asserted to be true, and could prove. The defendants denied, that they represented, they had in possession any title papers, or any evidence except that which would prove the heirship of defendants, Finley and the wife of Barr. On the contrary, they told the complainants, they had no title papers, and that they had only recently been informed of the existence of the land; and that the defendant, Finley, and the wife of Barr, had any title thereto. The complainant told defendants, he had long known that the heirs of Elizabeth Julia Ann Finley were entitled to one

undivided half of said lands; that he had a record of their names; had made inquiries for them; that he had been anxious to buy the interest of defendant, Finley, in the lands; as he, the complainant, had sold the said lands, and bound himself to give good titles, and he feared some other person would purchase the interest of the defendant, Finley, and his sister, and give him trouble. The complainant stated at the time, that he knew all about the title; and that if defendant, Finley, and his sister, Elizabeth Julia Ann Barr, were the children of Mrs. Finley, he was satisfied as to their right to the lands. Defendants admitted, that they agreed to forward to appellant evidence that defendant, Finley, and his sister, were children of Mrs. Finley, and meant to do so; but the death of *Mrs. Barr caused [*267
it to be neglected. The defendant, Finley, denied representing to appellant, that Mrs. Barr had executed a letter of attorney to her husband, and that defendants had only then discovered that it had been left behind: he admitted, that he might have told appellant, that Mrs. Barr was willing that her husband should sell her interest. The defendant, Barr, admitted he represented that his wife was willing he should sell her interest; and that a letter of attorney had been prepared to that effect, and left behind; but he denied recollection of saying it had been executed and acknowledged, and that he supposed he had the same with him, and had then only discovered he had left it behind. He admitted, he promised to forward the power, but the death of his wife prevented this being done.

The defendants denied intention or attempt to induce appellant to enter into contract, and pay his money thereon, by fraudulent representations. They admitted the payment of $1000 and $104, as stated in the bill; and that Mrs. Barr died a minor, without issue and intestate; but averred, that her death did not affect their right to comply with the contract, as the interest of Mrs. Barr vested, at her death, in defendant, Finley, who had been, and was willing to, fulfil it. They denied all fraud and combination, and averred and would prove, that they made the contract in perfect good faith, believing that defendant, Finley, and Mrs. Barr, had a legal right to a moiety of the land; the knowledge of their right chiefly came from appellant. But they denied, that at the time of making the contract, they had any knowledge of the date of the entry or survey, or of the date of C. Bradford's death; they alleged the first intimation they had that the land was entered and surveyed after his death, was derived from the bill. They admitted, from information, &c., since the bill was filed, that they believed the said lands were entered and surveyed at the times mentioned in the bill, and since the death of Bradford; who died about the time mentioned in the bill. The defendant, Finley, averred, that as soon as he was apprised of the facts mentioned in the bill, as to the date of entry and survey, he made inquiries as to the facts, and being satisfied that they were true, as alleged in the bill, he proceeded without delay to the surveyor's office in Chillicothe, to get information to take steps to procure an entry of said lands, that he might fulfil said contract; which he was ready and anxious to comply with. But he was surprised, when he ascertained, that the appellant, a few days before, on the 26th September 1835, fraudulently, and as defendant alleged, for the purpose of putting it out of *the power of defendants to [*268
comply with their contract, and to defraud the defendant, Finley, out of his lands, had entered the same lands, under surveys No. 2277 and No.

2278, mentioned in the agreement; as certified copies of the entries made by appellant, and made part of the answer, would prove.

The defendants averred, that the complainant, having made these entries, to further his designs, immediately filed this bill, without intimating objections to their title; although defendant, Finley, had met and conversed with him at Pittsburgh, after the entries were made, and before the bill was filed. The defendants alleged, and would prove that the lands were duly entered, surveyed and patented in the name of Charles Bradford, by virtue of which the defendant, Finley, and his said sister, at the date of contract were, as the heirs of Mrs. Finley, deceased, daughter of Charles Bradford, deceased, entitled, equitably and justly, to the undivided half of said lands, and had good right to sell and convey. By the death of Mrs. Barr, a minor, without issue, her right vested in the defendant, Finley, as sole surviving heir of Mrs. Finley; and being so entitled, he averred his power, readiness and willingness to make a perfect title to the appellant, for an undivided moiety of the lands, on the fulfilment of the contract by him. The defendants averred, that any title which the appellant might have acquired by his entry of September 26th, 1835, should be taken to inure to the benefit of them, for whom he held the lands in trust for fulfilment of the agreement; and they prayed that the bill might be dismissed, &c.

On February 13th, 1837, the appellant filed his amended bill, stating, that besides the money he had paid defendant on account of the contract, he released to them his interest to an undivided half of survey No. 4456, for 466⅔ acres, for the consideration of $500. That when he made the contract with the defendants, he believed that they had a perfect title to the lands they sold him; was ignorant that the entries, &c., had been made in the name of a man not in being; and that it was not for a considerable time afterwards, he came to a knowledge that the land was vacant, and that the defendants had no power to make him a title, and that the lands were subject to entry by a holder of a Virginia military warrant. He had previously purchased an undivided half of the same lands, and paid a large consideration. Deeming it right to protect his interest in the premises, on the 26th September 1835, he caused entries No. 13,696, for 1208 acres, and No. 13,697 for 1000 acres to be made; and on the same day, caused surveys to be made and returned, which were *recorded 28th September 1835. He re- *269] ferred to attested copies filed with the answer. The appellant charged the fact, that the lands being wholly vacant and unappropriated, he had invested himself with the best title to the same. He prayed, that the defendants might answer, and also, as in his original bill; or if it should be found that defendants, or either of them, had a good title to the land, and still had a right to the same, and had authority to make a valid conveyance, then the appellant was ready, and tendered the full and perfect completion of the contract on his part; and he prayed for general relief.

A separate answer was made to the amended bill, by David Barr, and filed February 25th, 1837. He admitted the deed of release of the appellant's interest in survey No. 4456, and that the consideration named in the deed was $500; but denied that that sum was the true consideration, averring that $104.13, credited on one of the notes, as mentioned in the original bill, was the true consideration. The defendant averred, that at the time

of making the contract, both defendants denied Galloway's claim to this survey, and set up the entire right to the same to be in Finley and his sister, then living; and that it was not considered nor formed any part of the contract; but after the contract was executed, Galloway urged a claim, at least for the taxes he had paid on the survey. This defendant agreed, in consideration of the release, to refund the taxes paid, by crediting the amount on the note. The sum of $500 was inserted at the instance of Galloway, to induce his wife, as he said, to sign the deed. The defendant, Finley, had nothing to do with this transaction. As to appellant's belief that Finley and his sister had a good title, the defendant said that the complainant represented to them that he knew all about their title. The defendant supposed that the appellant became acquainted with the facts that the entries and surveys had been made in the name of a dead man, after the date of the will of Bradford had been communicated to him. He could not admit, that the appellant had, by the entries, &c., in his own name, invested himself with the best and only title to the lands. The defendant denied that the lands were vacant and unappropriated at the time appellant entered them; but they had before been appropriated under warrants of Bradford, under whose entry, &c., Finley and his sister had acquired a good title, and had good right to sell and convey the same. He prayed that the bill might be dismissed.

*The cause was tried on the 26th of May 1837; and the court decreed that the bill of the complainant should be dismissed. The complainant prosecuted an appeal to this court. [*270

The case was submitted to the court, on printed arguments, by *Corwin* and *Mason*, for the appellant; and by *Fetterman*, for the defendants.

For the appellant, the following points were made:

1 Galloway was not obliged, by any principle of law or equity, to put the defendants in a situation to comply with their contract. Therefore, he was not bound to assist them in procuring a title, where none existed before.

2. Nor could mere silence and non-interference be imputed to him as a delinquency, for which his rights under the contract might be injuriously affected.

2. But Galloway did interfere; for when he discovered that the defendants had no title whatever to the land they had sold him, and that it was vacant, and might be appropriated, at any moment, by the first warrant-holder who should come to the knowledge of that fact; he entered it in his own name.

4. Was this act on the part of Galloway an interference inconsistent with any duty imposed on him, by the relation of vendor and purchaser then existing between himself and defendants? Was it a breach of good faith towards them, that ought, on admitted principles, to deprive him of the aid of a court of equity?

5. It appears from the pleadings, that Galloway had purchased, prior to the date of his contract with the defendants, an undivided moiety of the land in controversy, which he had afterwards sold, and bound himself to convey by a good title; that he was urgent in his solicitations to purchase the interest of the defendants, from an apprehension, as he said, of having trouble, should they sell to any other person. Hence, it is maintained, that

complainant had, as he asserts in his amended bill, "a right to protect his own interest in the premises," by making the entries he did, the 26th of September 1835.

6. Galloway had no authority to re-locate the warrant of Bradford either in his own name, or in that of the heirs of Bradford. But if he had such authority, he was not bound to exercise it, and could not have done so,
*271] without first returning to the general land-office, *the patent, for cancellation ; and then of incurring the risk of acquiring a doubtful title.

7. He could not have delayed to make the entries at the time he did, without the hazard of losing the whole land ; which he had already twice purchased.

8. It was certainly lawful for Galloway to secure, in the mode he has attempted to do, the undivided half of these lands which he had long before purchased and conveyed away. To accomplish this object, he was compelled to enter the whole, inasmuch as he could not enter an undivided part of the land.

9. Ought the acts of Galloway, in appropriating these tracts of land to himself, to inure to the benefit of the defendants? The parties were not tenants in common ; because the entire interest, if anything, was vested in Galloway. But neither party had any interest, legal or equitable ; and there can be no tenancy in common of a mere nonentity.

10. Unless Galloway was somehow disabled from doing what was lawful for all the world besides, he has undoubtedly acquired an equitable title to at least one undivided half of the lands. And as to the other moiety, he has an equity that ought to be protected ; as the defendants, having no title themselves, can lose nothing by the acts of Galloway, unless it should be a charge or mere possibility.

11. In determining upon questions of title, mere possibilities are not regarded ; the court must govern itself by moral certainty. When a considerable or rational doubt exists, notwithstanding the better opinion, in the judgment of the court, is, that a good title can be made ; a court of equity will not compel a purchaser to take the title. 2 Hovenden on Frauds 24–5, and cases there cited.

12. Where the vendor has in reality no interest to the subject of the sale though he believed he had, the contract will be set aside. 2 Hovenden on Frauds 13.

13. A decree may be obtained by a vendee to have a purchase contract delivered up, on the ground of the defective title of the vendor. 2 Hovenden on Frauds 24.

14. It is very properly admitted in the argument on the other side, as the law undoubtedly is, that entries made in the name of dead men, are null and void. But it is insisted, at the same time, that such entries are protected by the proviso to the act of the 2d of March 1807, as against all
*272] entries made subsequent to the passage *of that act. The contrary can be maintained, both by reason and authority.

Corwin and *Mason*, for the appellant.—The complainant has sought the aid of the court in this case, to rescind a contract for the sale of real estate. The facts necessary to be considered are few, and in general, admitted by the pleadings of the parties. The complainant alleges, that he purchased of

defendants the undivided moiety of 2200 acres of land, lying in the Virginia military reservation, in Ohio; for which he was to pay about $8000, in payments, the last of which would become due in 1839. That he paid $1000 at the time of completing the purchase, on the 11th of March 1835. That he also advanced, at that time, the further sum of $104, to enable the defendants to pay taxes due from them on other lands in Ohio. These facts are admitted by the answers of the defendants.

Is is alleged by complainant, and admitted in the answers, and by the printed argument of defendants' counsel, that complainant had, previously to the date of his contract with defendants, purchased of one Finley Bradford, a co-heir with the defendants, the other moiety of the same land now in controversy. It is alleged by complainant, and not denied by the defendants, that a controlling motive for entering into the contract of purchase with the defendants, arose out of the fact of his having sold parts of the land purchased of Finley Bradford, and bound himself to make titles under such sales, to the purchaser. The complainant insists, that at the time he purchased (March 1835), neither defendants, of whom he purchased the last, nor Finley Bradford, their co-heir, of whom he purchased the first half of the 2200 acres of land, had any title thereto, either in law or equity. That the land has been since appropriated by a valid entry and survey made in September 1835, in another and better right; and thus he fairly comes before the court to ask a decree for the rescission of the contract; on the ground of a failure, or total want of consideration moving from the defendants to him.

Upon this state of facts, two general propositions are to be established: 1. That defendants had no title, either in law or equity, to the land sold by them to the complainant. 2. That the land had been fairly appropriated by another, under *valid entry and surveys, so that defendants never can make a title for it. [*273

The facts necessary to be known, in order to test the validity of the title under which the defendants claim, are all undisputed in the pleadings. The history of titles, in what is properly called the Virginia military district, in the state of Onio, it too well understood by the court, to justify its recital here. The territory between the Little Miami and Scioto rivers, in Ohio, was set apart by the state of Virginia, to satisfy military bounties granted by her for services rendered in the revolutionary war. By the terms of cession of the territory north-west of the river Ohio, when the warrants for these bounties should be satisfied, the remainder of the territory (if any) between the two rivers just mentioned, belonged to the United States; and became a part of the national domain. Charles Bradford, under whom defendants claim, it is admitted on all hands, held a warrant which authorized him to appropriate 2200 acres of land, in this territory. And the question arises, whether any land whatever has been appropriated by virtue of this warrant.

It is admitted, that Charles Bradford, the owner of this warrant, died in Washington county, in the state of Pennsylvania, in the year 1789. The entries of the land, by virtue of the warrant in question, were made in the name of Charles Bradford, in 1793, and the surveys were executed in his name, in 1794. It is also admitted, that a patent has issued in his name; but when, is not shown by the record. Thus, it is shown that the entries

were made and the surveys executed, four years after the death of the proprietor of the warrant, and in his name. Did these proceedings attach to the specific property now in controversy, any right in favor of defendants, which is valid either in law or equity? We do not feel ourselves at liberty to consider the proposition thus stated, as one open for discussion before this court. It is only necessary to say here, that we consider it in all respects, as perfectly identical with the principle fully discussed and settled by this court, in the case of *Galt* v. *Galloway*, 4 Pet. 332, and *McDonald* v. *Smalley*, 6 Ibid. 261.

It will be borne in mind by the court, that although the property in question is situated within the limits and territorial jurisdiction of Ohio, and would, therefore, be subject, in the hands of individuals, to the legislation of that state, in all things affecting its transfer by deed or devise; yet as a part of the public domain, the mode of acquiring right to it, and separating
*274] it from the mass of public lands, is to be * prescribed by the laws of Virginia; and such regulations as the United States government have, from time to time, since the cession of Virginia, thought proper to make concerning it.

If, however, the court should suppose, that the question of law under consideration, could in any degree be affected by the *lex loci rei sitæ*, it will be found, that the highest judicial tribunal of Ohio has settled this question, in exact conformity to the law as laid down by this court. In the case of *Wallace's Lessee* v. *Saunders*, 7 Ohio 179, the court, without a dissenting opinion from either of its four judges, declare, that an entry of Virginia military lands in Ohio, made in the name of an individual, not living at the time, is not merely defective, but that it is, as this court have said, a mere nullity; that it leaves the land open to be taken up by any one holding a warrant, as though no attempt at appropriation had ever been made.

It is proper here to consider whether Bradford's entry, being void, as has been shown, is made valid by the act of congress, of the 2d of March 1807, which has been continued in force, by various re-enactments, up to the 31st of March 1832; which last is still in force. The proviso in all these acts, which is supposed by defendants' counsel to protect the entry of Bradford, under which they claim, is in these words: "Provided, that no locations as aforesaid, within the above-mentioned tracts, shall, after the passage of this act, be made on tracts of land for which patents have been previously issued, or which had been previously surveyed; and every patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void." (See 2 U. S. Stat. 425, 589; 3 Ibid. 143, 212, 423, 612, 772; 4 Ibid. 189, 395.) 8 U. S. Laws 531.

It is conceded by the defendants' counsel, that the proviso in question was intended to protect from interference "defective entries and patents;" and that this has been the uniform construction placed upon it by the courts of the country. We agree with this exposition of the law, and admit, that if the entry and survey of Bradford were merely defective, and not void, that they are protected by the act of congress, and the subsequent entry of Galloway is void. The case of *Doddridge* v. *Thompson*, 9 Wheat. 481, is an authority to show that the act in question was passed, as the court there say, "to cure defects" in titles already acquired. This court has deter-

mined, that the proviso in the act of 1807 does not protect a survey against locations, where the entry on which *such survey was made had been withdrawn. *Taylor's Lessee* v. *Myers*, 7 Wheat. 23. In the case of [*275 *Lindsey* v. *Miller*, 6 Pet. 666, the court declare, that void entries and void surveys are not protected by the proviso in question. In commenting on the case of *Jackson* v. *Clark*, 1 Pet. 628, the court say, that they "gave effect to the act of congress in that case," because the survey was not void, but merely defective. 6 Pet. 677.

If entries and surveys made in the name of dead men are void—are mere nullities—and leave the land upon which they are made open to subsequent location, as this court has decided, in the case cited from 4 Pet. 332, and 6 Ibid. 261; and as has been also decided in 7 Ohio 173, then it follows, that the act of congress relied upon by defendants, cannot protect the land in question, from the entry of Galloway, made in September 1835. We refer the court here to the case in 7 Ohio 173, as an express authority upon this very point. The effect of the proviso, in the act of 1807, upon an entry in the name of one not in life at the time, is there considered, discussed and decided by the court. We consider that as settling the law of this case, so far as the proposition now under discussion affects it.

Having arrived, we hope, satisfactorily, at the conclusion, that Bradford's entry, being originally a nullity, left the land in question a part of the Virginia reservation, open to any holder of a warrant, to locate; we come to consider, whether it has been appropriated by another, in such manner as to withdraw it for ever from the power of the defendants. The entries and surveys of Galloway are set forth in the record, and admitted to be made on proper warrants, and by competent authority. Thus far, it seems quite impossible to resist the conclusion, that the land in question was vacant land, up to September 1835; and if Galloway's entry is good for the purpose of appropriation at all, it remains to inquire, whether such entry shall inure to its own, or another's benefit.

It is insisted by defendants' counsel, that the relation of vendor and vendee, which subsisted between complainant and defendants, created a trust, which obliged Galloway, as trustee for defendants, to use the original warrant of defendants' ancestor, which, by his death, descended to his heirs, for the purpose of appropriating the two surveys in question. It will be admitted, we are sure, that on this branch of the case, it is incumbent on the defendants to show: *1st. That the contract between them and [*276 complainant, by necessary implication, devolved this duty on the latter. 2d. That in September 1835, when it was discovered by both parties, that the land in question was vacant; it was clearly in the power of Galloway to make, at that time, a valid legal entry, by virtue of the original warrant of Charles Bradford, deceased. If either of these positions are doubtful, or clearly ascertained against the defendants, then the court are left no alternative but to give full effect to Galloway's entry made in September 1835, for his benefit.

On the first proposition, it becomes necessary to inquire, to what extent the vendee of real estate may be said to stand in the relation of trustee to his vendor. The rule we conceive to be laid down very accurately in Sugden on Vendors 162. It is there stated, that "equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser

as a trustee of the purchase-money for the vendor." The same principle is in substance determined in *Green* v. *Smith*, 1 Atk. 572, and in *Pollexfen* v. *Moore*, 3 Ibid. 272. Thus, it appears, that the mutual trusts imposed on vendor and vendee of real estate by courts of equity, are nothing more than the duty of performing, in good faith, the stipulations of their agreement. The vendor is charged with the duty of conveying, as he has agreed to do, the estate; and the vendee is, in equity, held bound to pay the purchase-money, as he has agreed to do. Hence, it follows, that complainant was not bound by any principle of equity, to put the defendants in a situation to comply with their contract; he was not surely bound to assist them with money or services, to enable them to make a title to the land they had sold; he was not bound to inform them that the land was vacant, because the entry on their warrant, made in the name of, and after the death of, Charles Bradford, was void. It cannot be pretended, that silence or inaction on his part, would deprive him of the aid of this court, on the pretence, that because he had said or done nothing, he had, therefore, acted in bad faith towards the defendants. On the contrary, the law is, that the vendors (the defendants in this case) were bound to the complainant, for the knowledge in themselves, of all these things. They expressly covenant, "that they are seised and possessed of a good and sufficient title to the premises hereby stated to be sold by them to the said James Galloway, jr." They took upon themselves to know, that they had the title and *right to the thing *277] sold, and in addition to the legal obligation to that effect, they give an express covenant to the complainant on that subject. That the law obliged them to know their right, or forfeit their contract, we refer the court to the case of *Allen* v. *Hammond*, 11 Pet. 63; and *Hitchcock* v. *Giddings*, Dan. Exch. 1, there referred to, and approved by this court. In the case just cited, on page 72, Mr. Justice McLean, in delivering the opinion of the court, says: "The law on this subject is clearly stated in the case of *Hitchcock* v. *Giddings*, Dan. 1; where it is said, 'that a vendor is bound to know, that he actually has that which he professes to sell, and even though the subject-matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately, yet, if the contingency has already happened, the contract is void.'" The same principle is in substance to be found in 2 Hovenden on Frauds 13.

Let us apply the principle of the cases just referred to, to the present. The defendants were bound to know that they had "a good legal title to the land sold; they covenanted with complainant, in March 1835, to that effect, and in those words, they received from the complainant $1104 on this contract. Seven months after this (in September 1835), the complainant learns, that defendants had no title whatever to the land thus sold, and the defendants admit that they had none at that time: was not this contract void in law, and would it not have been so adjudged, had the case been then presented? If so, had not Galloway a right to treat it as the law treats it, as void, and act accordingly. In the case of *Allen* v. *Hammond*, the court say, "if the subject-matter of the contract be known to both parties as liable to a contingency which may destroy it immediately, yet if the contingency has already happened, the contract is void." Here, the fact, perhaps unknown to both parties, that is, the death of Charles Bradford before the entry, was

what destroyed the right to the land sold; it had happened, and therefore, the contract was void, the moment it was executed.

Galloway being thus, in September 1835, divested in law of all obligation to the defendants, under this contract, and the land in question being vacant, he has, in good faith made it his own, by entering it on his own warrant; or, in other words, he has purchased it of the owner, and the only owner, with his own funds. He has left the warrant in the hands of Bradford's heirs, just where he found it, unsatisfied and unlocated. He has, by his entry, deprived them of nothing which *they had before his entry. Their warrant is as good in the law, and worth as much now, [*278 as it ever was! It will buy 2200 acres of land anywhere in the Virginia reservation. If that territory is exhausted, the faith of a sovereign state is pledged to make good the deficiency; and if that duty, as some say, be transferred to the United States, no one can doubt the ability or the disposition on their part to give full indemnity in money or lands to all *bonâ fide* holders of such warrants. Let us suppose, that instead of military land, the defendants had sold to complainant congress land, say, section No. 10, in a given township and range. Suppose, the complainant possessed, no matter how, of $800 in cash, belonging to defendants. The complainant, looking after his title to the 10th section, finds that it has never been entered or bought by any one, in any way, but is open to entry at one dollar and twenty-five cents per acre. Would any court imagine, that it then became the duty of the complainant, to take the money of the defendant in his hands, and buy of the government the 10th section, in defendant's name; or could it be conceived within his province, as vendee of a tract of land, at any time, to seize the money or property of the vendor, to make good the title which he had contracted for. Such is the case, as contended for by the defendants here. The defendants, indeed, knew that such a warrant, as would appropriate the land in question, was said to exist; but the court will bear in mind, that neither the warrant nor the patent, if in existence, were then, or are now, either in the hands of complainant, or any one for his use. And this brings us to consider, secondly, whether it is shown by defendants, that Galloway, in September 1835, had it in his power to locate the original warrant of Bradford on the identical land in question, at that time, so as to make it certain that by such act he would be able to obtain a legal title, without litigation, to the land in question.

In the first place, the court will remember, that the warrant was not in our possession; that we had bought and paid for one undivided half of the 2200 acres of Finley Bradford, who seems to have had just claim as heir, to one-half of the warrant. In the second place, a patent had issued for the identical land in controversy, which seems not to be in the possession of either party. We maintain, that an assignment of the warrant, by the heirs of Bradford, was indispensable, to enable us to enter it in complainant's name. But if it be said, that our contract for the land supposed to be entered by it, is equivalent in law to an assignment; to this, we answer, that such entry *would not be good against one holding the warrant, with [*279 an assignment, without notice of our purchase. Such an assignment may have been made by Finley Bradford, or by defendants, at any time since 1789; for from that day to this, the warrant has been capable of such transfer, never having been lawfully located, at least, so far as we are

informed, by the facts in this cause. Surely, then, the court will not say, that complainant was bound, for the benefit of defendants, to run this hazard; and thus, in the event of his failure, to make the warrant a good foundation for this entry, lose the whole land which he had fairly bought, leaving himself to be charged with that very *mala fides* towards those who had bought of him under his purchase from Finley Bradford, to whom it is admitted he had bound himself to make good legal titles. Nor could the defendant enter "an undivided moiety" of the 2200 acres: he must, in order to make the contract of defendants good, have entered the whole; and hence it became necessary to have command of the whole warrant. Defendants only claim one-half; and what disposition may have been made by the other heir of Bradford of his portion, is not shown to the court, nor is it presumed to be known by complainant. It is unknown to the court, and so far as we know, to the parties, whether Finley Bradford is living or dead. His half of the warrant, if he is dead, descended to his heirs-at-law! Who are they? Where are they? Are they minors or adults? All these questions at once arise, when Galloway is asked, in September 1835, to use this warrant for the purpose of obtaining a clear legal title to this land. If any doubt existed as to his right so to do, or as to the probability of such act being good, to hold the land and obtain a patent, without litigation, then it is clear, the court will not hold, that he was bound to incur such risk. Having bought one undivided half of the 2200 acres, and sold (as he avers, and is admitted) on the faith of that purchase; every obligation of good faith and correct morals impelled him to make sure that which was necessary to enable him to comply with his own engagements.

But a patent had issued for the land. We insist, that no entry could be valid, by virtue of the warrant, the use of which caused that patent to issue, till the patent itself was produced and cancelled. We refer the court to the usage of the general land-office, as laid down in the letter from the solicitor of that bureau, which we have appended to our argument, showing the difficulties which would have attended an attempt at relocation of the warrant
*280] belonging to *Bradford's heirs, by Galloway. If the title was in doubt, which was thus to be derived, then the court will not say that he was under obligation to make any effort to secure the land through that channel. See 2 Hovenden on Frauds 24–5, and cases there cited.

It becomes a question of primary importance, under this state of things, whether Galloway was bound (after the discovery that defendants had no title to the land, and that it was *then* vacant) to notify defendants, by writing to Pennsylvania, and giving them an opportunity to search for the warrant; to institute an inquiry for the patent, which must be delivered up and cancelled; to find Finley Bradford, if living, or his heirs, if he should have died; and after obtaining all these pre-requisites, to come to Chillicothe in Ohio, and enter the land in their own names. Because he did not do this, he is charged with not only overreaching the defendants, but also himself. To ascertain his duty in such an exigency, we must look at all his liabilities and all the circumstances; for, from a correct view of these are the moral and equitable obligations of men always derived. It is a matter of history, that the holders of warrants, since 1830, have been in the habit of laying them on all lands subject to entry, by reason of the previous entry being void, as in this case. Many valuable farms, long cultivated and possessed

under entries and surveys made in the name of one dead at the time, have been taken from the possessors by subsequent entries. We mean no disparagement to that officer, when we assert, that the register himself has been in the habit of ascertaining such cases, and buying warrants, and locating them on lands thus situated. When, therefore, Galloway ascertained this to be the situation of the land he had bought; when he looked to those to whom he had sold on the faith of such purchase, to whom he was bound to make titles; when he saw that this land, thus vacant, was at the mercy of the many speculators who abounded in that quarter, in search of such lands; how could he, in good conscience, let an hour pass, without placing himself and his vendees at rest as to the title? Had he sent a courier to advise the defendants, before he returned, the land would have been entered, and thus he would for ever lose one-half of it, already paid for, and forfeit his contracts with all to whom he had sold; whilst the defendants could gain nothing by this idle and dilatory proceeding.

*The only course an honest man could take, under such circumstances, was that pursued by complainant: with his own funds, he proceeded to make sure of the title necessary to fulfil his own contracts. He bought and paid for the whole, and for one-half of it he has paid twice. Shall all this sacrifice on his part now inure to the benefit of those who have led him into difficulty, from which he has been obliged to extricate himself with his own means, through ignorance of their right to that which they professed to own, but which in fact was not theirs. [*281

But if the complainant had been the trustee of the defendants, constituted by deed, to hold for them the very land in question; we contend, that he had, under the circumstances, a right to purchase and hold it. The law is settled, we believe, that where, by a judicial decision, the property held in trust is found to be owned by another, then the trustee may lawfully purchase the property and hold it in his own right. This doctrine is founded in reason and equity; when the fiduciary character is terminated for want of an object, the trust is at an end. Hovenden on Frauds 474–5, 482. Here, the land as to which the supposed trust existed, by the judicial determination of other cases identical with this, was known to all who knew the law, to be vacant land, and to be owned, not by individuals, but by the government. In September 1835, by the laws of the land, it was not the property of defendants; and therefore, no trust in their favor can be raised on a contract concerning it.

In this view of the subject, the parties, if either had any equity, stood precisely equal. Neither had any right to the land, in law or equity. If the complainant has appropriated it by valid entries, first, he is the owner, and must hold it against all the world. If the possession and ownership of warrants give an equitable right to land, then complainant had equal right with defendants. The latter, in September 1835, owned a warrant, or part of it, calling for 2200 acres of land in that district; complainant had also a warrant for that quantity; he entered his, and thus obtained a legal right to the specific land, better than the defendants' equity, if such it may be called. In this view of their rights, the well-established doctrines apply with full force in favor of complainant. Between equitable claimants, he who has precedency in time has advantage in right. *Fitzsimmons* v. *Ogden*, 7 Cranch 2.

Having disposed of the question of right, we think proper to submit
*282] *an observation to the court as to the effect of a refusal to rescind the contract. Complainant prays a rescission; and if that cannot be granted, a confirmation of the title. What compensation can the court make for the money expended in the second purchase. The land is held by virtue of Galloway's entry; if he is confirmed in this, and the contract still enforced, surely he is to be paid for his warrant. At what price, is this to be estimated? If his expenditure inures to defendants' benefit, he should be allowed the amount of that expendiure on his contract. What is that amount? It would seem to be quite impossible, by a decree, to compel Galloway to withdraw his entry, and go to the register's office, and make an entry on Bradford's warrant, in the name of Bradford's heirs. To enable the court to see the equity of such a decree, it was incumbent on the defendants, to show the court, whether this warrant be in existence, and where it is; that it has not been assigned, in whole or in part, by any of the persons to whom it passed by descent; that it is not, in whole or in part, in the hands of a *bonâ fide* holder, by transfer, as above suggested, so as to make it impossible to appropriate land with it. Defendants should also show, that this last could be done now, upon the instant, so that the land may not be subjected to that result which inevitably awaits it; an entry, in the meantime, by a third person, so soon as Galloway's entry is declared invalid. They should show, that the patent is at hand, to be cancelled as the regulations of the land-office require, before any new title can be allowed to exist, in its inceptive form, under the old warrant. It was the total want of all these requisites to any safe and sure proceeding of the kind; all of which resulted from the ignorance of the defendants of that title which they assured the complainant they had, and which by law they were bound to know they had; it was this accumulation of doubt surrounding the title, which might have been, by possibility, created by the aid of Bradford's warrant, which made it not merely the privilege but the duty of complainant, to reject it altogether; and for his own security, to rely on his own funds, to repurchase of the government what he had in vain sought to obtain through the defendants' rights. The court cannot fail to see, how great a perversion of language it would be, to apply the phrase employed by Lord NOTTINGHAM, in *Maynard's Case*, to the conduct of complainant in this. It is said in that case, that equity will not aid one who "overreaches himself." The idea of a reasonable being setting himself to work to prac-
*283] tise knowingly a fraud on himself, which seems the *true and only definition of the phrase, is not, according to any established notion of human conduct, so clearly possible, as to admit it amongst those plain and simple elementary truths which compose the great body of chancery law. It might naturally enough, however, suggest itself to a mind perplexed and mystified as his lordship's, no doubt, was, by the tortious expedients of one of the parties in that case to gain an undue advantage. But as there is no similarity between the facts of that case and this, so there is no propriety in applying any rule of that case to the present. Instead of "overreaching himself," the complainant in this case, when he made his entry, stood exactly in the condition of a *bonâ fide* purchaser, finding his title not merely in peril, but utterly gone. He was compelled to protect himself. His is the case which a court of equity will protect against "a

creditor, or an heir, or the fatherless." Sugden on Vendors 723. His own warrant and his own entry, were the only plank he could seize in the shipwreck, to which the culpable ignorance of the defendants as to their own rights had exposed him.

Fetterman, for the defendants.—To form a correct opinion upon the question, whether the complainant, in this case, does present himself under circumstances which impose on a court of conscience obligations to give him its aid, it will be useful to take a general view of that system of land titles which has been introduced into the Virginia military district, in the state of Ohio, within which the land in controversy lies. That system of law being made up of usages, and growing out of circumstances, both of which are peculiar to itself, and out of the range of treatises on common law and equity, the bar of Pennsylvania have had little occasion to make themselves acquainted with even the leading features and outlines of those military titles. So far as my limited knowledge will enable me, I will attempt a concise statement of the several steps by which a military title is perfected.

Upon proof to the executive of Virginia, by a person, that he is entitled to bounty lands, under the law of that state, for revolutionary services in the Virginia line, on continental establishment; the governor issues his warrant, which is a mandate to the principal surveyor of the military district, directing him to survey for the person entitled to the bounty, the quantity of land specified in the warrant. The warrant does not direct what particular tract of land shall be surveyed; and by usage, the owner of the warrant, *or his agent, has a right to direct the principal surveyor to survey the warrant (that is, the number of acres called for by the warrant), in one or more tracts, on any lands within the district he shall de signate, not previously appropriated to the satisfaction of some other warrant. The specification of the particular tract or tracts selected in satisfaction of the warrant, is made in a book kept by the principal surveyor, called "The Book of Entries or Locations." The entry or location is a mere entry or statement in the book aforesaid, of the quantity of land entered; the number of the warrant which it satisfies, in whole or in part; the name of the person for whom the entry is made, together with a general description of the locality of the land entered; any description which can be reduced to certainty by a subsequent survey, is sufficiently certain and specific; next follows the survey of the entry, which must conform to the calls of the entry; a certified copy of the warrant, entry and survey on them, is forwarded to Washington City, to the commissioner of the general land-office of the United States, upon which a patent issues in conformity with the survey. [*284

The owners of these warrants, for the most part, resided in Eastern Virginia, several hundred miles from the district; and the lands were chiefly taken up, in satisfaction of them, at an early day, while the district was a wilderness; consequently, the whole business of making entries or selections of land, was by agents. These agents were generally deputy-surveyors, appointed by the principal surveyor to make surveys for him, as his deputies. They, therefore, held the double relation of agents for the owner of the warrants, and deputies of the principal surveyor. Every holder of a warrant would naturally seek to get the best lands, unappropriated. To effect that

object, men who had acquired an intimate knowledge of the localities of the district, such as hunters, Indian spies, &c., were sought after. This class of men took up the business of surveying, and became the deputies of the principal surveyor. The business of selecting land, and making entries and surveys for owners of warrants, fell almost entirely into the lands of this class of men. There were no lawyers among them. This system of titles and of law, was not, therefore, marked out by judges and lawyers; but by plain, practical woodsmen and surveyors, who were ignorant of law as a science. The property of a large and rich country is based upon their transactions. Courts, therefore, have inquired into their usages, and have sustained their proceedings, wherever they were *not in conflict with established principles of law, which the ministers of justice were bound to obey.

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These deputy-surveyors were ignorant of the principles of the common law, "that to vest a title to land, either legal or equitable, there must be a person *in esse* to take." It was the common opinion of all locaters, that if the entry and survey were made in the name of the soldier to whom the warrant issued, that was sufficient; "without going into the inquiry whether he was dead or alive." As a consequence of this general error, a vast number of entries in the military district, both in Ohio and Kentucky, were made in the names of deceased persons, to whom warrants had issued. It is obvious, that such entries must have been made in ignorance of the law or the facts, as, in every conceivable case, there was every inducement to make a valid entry; and no motive can be conceived for the making of a void one. This subject attracted the attention of the Kentucky legislature, as early as the year 1792. As it was known, these entries were numerous in that state, and intended to be *bonâ fide* appropriations of the land entered, in all instances, a quieting act was passed in that year; which declared that lands granted to deceased persons, should descend to their heirs or devisees. (Morehead and Brown's Statutes of Kentucky, vol. 1, p. 779; Littell's Laws, vol. 1, p. 160.) This defect seems not to have come to the knowledge of the locaters in Ohio, who continued the same mode of location till 1830; when the supreme court of the United States decided, that an entry in the name of a deceased person was a nullity. *Galt* v. *Galloway*, 4 Pet. 332; same doctrine affirmed, *McDonald* v. *Smalley*, 6 Ibid. 261. By those decisions, the entry in the name of Bradford, in the present case, would be a nullity, were no law of congress affecting it applicable to those cases.

My present purpose is, to treat the entry in the name of Bradford, as a nullity; as though this, and the two cases above referred to, were precisely the same in facts and circumstances. The entry, then, in the name of Bradford, being a nullity, it follows, of course, that the warrant issued in his name remained unsatisfied, and is so to this day; and that the warrant, on the death of Bradford, descended to the heirs of Bradford (*Kerr* v. *Moon*, 9 Wheat. 570); and not to his administrators. Consequently, the heirs of Bradford, on discovering the invalidity of the entry, had nothing to do but to re enter the warrant on the same land, and acquire a valid title. In this way, they could have readily cured the defect, if any, in the title of the land in question; *for, up to the time of the entry made by the complainant, in September 1835, the land remained unappropriated, according to complainant's own showing. That the respondents had it in

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their power to cure the defect in their title, also appears by the complainant's own showing, and by his own conduct; and it was to prevent their doing so, that the complainant kept the defect from the knowledge of the respondents, until he had effected an entry of the land in his own name. Had not Galloway entered this land, but filed his bill for rescission of contract, for defect of title, would not the court have said, it is in the power of defendants to perfect their title, and they should have an opportunity of doing so? And how came he possessed of facts which enabled him to detect the flaw in their title? As again appears by his own showing, through the respondents. They communicated to him the date of the death of Bradford; on comparing which with the date of the entry, he being an old locater, and a party to the suits of *Galt* v. *Galloway* and *McDonald* v. *Smalley*, knew full well the defects of the title; and equally well did he know that the respondents were ignorant of the defects. When, therefore, through the respondents, and in consequence of their contract with him, he became acquainted with this technical flaw in their title, of which they were totally ignorant, what was he bound in equity and good conscience to do? Had he a right to use that information, so acquired, to defeat their title; and to put it out of their power to comply with the contract with him? I think he was bound, by every principle of honesty and fair-dealing, to have pointed out the defect to them, that they might remedy it (a matter so easy for them to effect), before they would have had to make him a title, which, by their contract, they were not bound to do till January 1839. If he was not morally bound to point out the defects to them, he certainly had no right to do any act which would prevent their making him a title at the time stipulated.

I take it to be a well-settled principle, both in law and equity, that an obligee shall do no act to obstruct or prevent the obligor from complying with his convenants; and if he do, the obligor shall be thereby discharged from its performance. *Ballow* v. *Tucker*, 1 Pick. 287; Co. Litt. 206; Bac. Abr. tit. Condition; 5 Vin. Abr. Condition, 242, &c. And when a complainant comes into a court of equity, liable to such an imputation, it is certain, that the court will not grant him its aid, but will leave him to his remedy at law, if any he have, or is entitled to.

*That in this case, the complainant has, knowingly and dishonestly, done an act which deprives the respondents of the legal power to comply with their covenant to convey a good title, there can be no doubt resting upon the mind of any one who will carefully examine the transactions, as disclosed by the bills and answers. The statute of Kentucky, before referred to (Moorehead and Brown, vol. 1, p. 779; Littell's Laws, vol. 1, p. 160, 1792) shows, that the title was void, by reason of a technical rule of law. Yet they are *bonâ fide* titles, which in equity had a claim to protection. Hence the passage of that act. The words of that act are as follows: "Whereas, in some instances, grants have issued in the names of persons who were deceased prior to the date of the grant, and cases of the same nature may happen in future: Be it enacted, that in all such cases, the land conveyed shall descend to the heir, heirs or devisees, in the same manner that it would do, had the grant issued in the lifetime of such decedents." This act, though it language extends to the healing of titles, where the patent only issues before the death of the patentee, yet the courts of Kentucky have, by a series of decisions, extended the equity of the act to cases [*287

where the entry and warrants bore date subsequently to the death of patentee. *Hansford* v. *Minor's Heirs*, 4 Bibb 385; *McCracken's Heirs* v. *Beall*, 1 A. K. Marsh. 208; *Bowman* v. *Violet*, 4 T. B. Monr. 351; *Adams* v. *Logan*, 6 Ibid. 177; *Lewis* v. *McGee*, 1 A. K. Marsh. 200; *Speere* v. *Fisback*, Ibid. 356.

A recent act of congress, passed May 18th, 1836, entitled "an act to give effect to patents for public lands, issued in the names of the deceased persons, provides, that in all cases where patents for public lands have been, or may be, issued in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees or assignees of such deceased patentee; as if the patent had issued to the deceased person, during life; and the provisions of said act shall be construed to extend to patents for lands within the Virginia military district in the state of Ohio."

It is apparent, from the provisions of the foregoing act, and from the fact that congress saw fit to pass it, that that enlightened body considered, as did the legislature of Kentucky, nearly a half century before, such titles, though void in law, entitled to protection, as *bonâ fide;* and but for the act of the complainant in this case, in entering *the lands in dispute, *288] these respondents, beyond all doubt, would, by virtue of the aforesaid act of congress, have had secured to them a perfect legal title to said land; and I shall endeavor to show, that they have such a title vested in them, by virtue of said act of congress, notwithstanding the disonest and fraudulent efforts of the complainant to deprive them of that title—of that hereafter, when I shall have disposed of the case, so far as it rests upon equitable principle. And it is not my purpose here, to discuss the question, "whether Galloway could, under the circumstances, recover in a court of law, on the covenants of these respondents in their contract with him;" whatever may be his right in a court of law. It is very clear to my mind, that a court of equity will leave him to resort to his legal remedies, if any he has; and will not afford him its aid, to enable him to reap the fruits of an attempt to overreach the respondents. It is a leading principle of equity, that a court of chancery, when called on for specific aid, exercises its discretion whether it will interpose; and will in no case interfere, when the party seeking its aid has practised any unfairness. He must come into court with clean hands. This principle is as old as the chancery law itself—as long ago as *Serjeant Maynard' Case*, 2 Freem. Ch. 1 (new edition), Lord NOTTINGHAM, in delivering the judgment of the court, said, "that as this suffers no man to overreach another, so it helps no man who has overreached himself, without any practice or contrivance of his adversary." *Maynard* v. *Moseley*, 2 Freem. Ch. 106; 3 Swanst. 652.

Again, "in equity, a party is not at liberty to set up a legal defence, which grew out of his own misconduct." 2 Hovenden on Frauds 16; *Morse* v. *Merest*, 6 Madd. 26. Surely, if such a legal defence could not be set up, much less could it be made a ground for relief by a complainant. It is also a familiar rule in equity, "that he who comes into court for assistance, must do equity." *Rowe* v. *Wood*, 1 Jac. & Walk. 337; 2 Hovenden on Frauds 41. "The interposition of courts of equity is governed by an anxious attention to the claims of equal justice; and therefore, it may be laid down as an

universal rule, that they will not interfere, unless the plaintiff will consent to do that which the justice of the case requires to be done." Fonblanque's Equity, note *a*, p. 190, ch. 4, § 41 (Phila. ed. 1831).

Now, it may be asked, what does the justice of this case require of the complainant? The court will prescribe such terms to him as justice shall require; and those terms will be, I conceive, that he shall *pay to the respondents the contract price of the land, agreeable to his contract. [*289 And that the respondents convey or assign to him, out of the unsatisfied warrants belonging to them, a number of acres, equal to the quantity contracted to be conveyed to him by them, and which he has put it out of their power to convey. Both parties will then stand as they would have done, had the complainant not interfered, and respondents re-entered and perfected their title. A vendor is entitled to specific performance, though he have no title at the sale, if he can make one before the master's report. 10 Ves. 315; 14 Ibid. 205. There are many cases in which, though courts refuse specific performance, yet they will not rescind contracts. 1 Wheat. 196. See also, 2 Story's Equity 88, and the cases there referred to. This, I take it, would be fair and equitable, were the courts authorized and disposed to interfere in granting relief in any shape.

But if I have a correct view of the case, and the principles which should govern it, no relief whatever can be granted. A decree of dismissal of the bill, with costs to the respondent, is all that can be done, and that on the ground, that complainant asks the aid of the court to enable him to overreach the respondents; and that is all that I can discover he does seek.

I have thus far discussed the case, on the hypothesis that the title of the respondents was null and void. I shall now endeavor to show, that though it was so in its inception, the law has come to their relief, and made that a valid title, which at one time was declared by courts to be a nullity. And the entry made by Galloway in September 1835, is null and void, on the ground of its being an illegal interference with the rights and title of the respondents, in violation of an express prohibition of law. Up to the year 1807, the patent granted in the name of Bradford, a deceased person, was a mere nullity, it is conceded, on the authorities already cited. And any person holding a military warrant, might have entered the land it covered. But since the 2d March 1807, it is believed, the lands covered by the warrants in the name of Bradford, have not been open to the entry of any other person, or liable to be covered by any other warrant,

On the 2d of March 1807, congress passed an act, the 1st section of which extended to owners of military warrants a further term of three years to complete their locations; which act had the following *proviso: "Provided, that no locations as aforesaid, within the above mentioned [*290 tracts, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed. And any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void." In May 1826 (4 U. S. Stat. 189), congress passed an act extending the time for making locations till 1st of June 1832. The 3d section of that act contains the prohibition of the act aforesaid of 1807; and extends that prohibition to United States' lands, which the act of 1807 did not do. On the 31 of March 1832, congress passed another act, extending locations

for seven years. It being an extension of the act of 20th of March 1826, of course, has the prohibiting claim as to military lands, and is now in force.

In the case under consideration, there was both a survey and patent; and it furnishes a case clearly within the provision referred to. That the proviso could have been intended only for valid surveys and patents, is idle to suppose; such needed no protecting legislation. The proviso was intended to protect lands defectively located and patented, no doubt; and so the supreme court of the United States, have decided. *Doddridge* v. *Thompson*, 9 Wheat. 481. In that case, the court say, "the records of this court show, that many controversies were produced in that country, by the mode of locating and surveying military lands, which had been adopted under the laws of Virginia; and it is not unreasonable to suppose, that congress, when giving further time to make locations and surveys, might be disposed to cure the defects in titles already acquired, and to prevent second locations on lands already located. The words of the proviso, too, are adapted to the saving of private rights." In the case of *Doddridge* v. *Thompson*, the defendant attempted to protect his title, under the proviso of the act of 1807, on the ground, that the survey of the plaintiff was made in 1810, after the passage of that act. But the court decided, that the proviso was not applicable to sales of land at the United States' land-offices; and was intended to embrace only military surveys and patents. Besides, the prohibition was only as against locations, and the facts of the case did not show, but the location was made previous to the passage of the act of 1807; and in the absence of proof on that subject, the court would presume, that the location
*291] was made previously, in support of the *patent of plaintiff. The reasoning of the court, in this case, plainly shows, that had the defendant's title been one of military origin, and the location of the plaintiffs been after the passage of the act of March 1807, his (the defendant's) title must have prevailed by reason of the proviso aforesaid.

In the case under consideration, the title of the respondents is of military origin; and the location, survey and patents, all bear date previous to the passage of the act of 2d March 1807. The title of the complainant is also of military origin, and his location and survey are both since the passage of the act of March 31st, 1832, now in force, and containing the proviso of the act of 2d of March 1807. It is not easy, therefore, to conceive, how the location of the complainant, made on 26th of September 1835, can possibly escape the operation of the proviso of the act of March 1807, and the prohibition contained therein. The location of the complainant coming within that prohibition, then, as I humbly conceive it clearly does, it must be null and void. And the title of the respondents being thereby freed from the embarrassments of Galloway's entry, is, by the healing operation of the act of 18th May 1836, made good and valid. It may not be amiss, to remark here, that so vigilant has congress been in protecting defective titles, acquired *bonâ fide*, that after the decision in the case of *Doddridge* v. *Thompson*, in which the court decided that the proviso of the act of 1807 did not extend to lands under the United States' survey; in the very next renewal of the extension of time for making locations on military lands, the prohibition was made to extend to lands within the district, sold by the United States.

The decisions in the cases of *Galt* v. *Galloway*, and *McDonald* v.

Smalley (which have no doubt been relied upon by the complainant, to sustain him in his illegal and unjust course of conduct in this case, being a party to both those cases) can have no bearing on this case. The facts in this case are so widely varying from the facts of those cases, as to render them entirely inapplicable. In those cases, the party holding title under the entries made in the name of the deceased person, could not avail himself of the benefits of the proviso to the act of 1807 ; as the entries and surveys in each case, by both parties, were made previous to the passage of that act. In *Galt* v. *Galloway*, Galt's entry was made in August 1787 (4 Pet. 333), and the withdrawal, in 1805, five years after Galt's *death, [*292
and two years before the passage of the act of 1807. In *McDonald* v. *Smalley*, McDonald claimed under an entry made 24th August 1787, in the name of David Anderson ; at which time Anderson was proved to have been dead. The defendants, Smalley *et al.*, claimed under an entry on some land, made the 19th of February 1793, in the name of Stephen T. Morou, and a patent to Morou, in 1796, and before a patent issued on McDonald's entry. These cases, therefore, not coming within the provision of the act of 1807, do not conflict, in the least, with the opinion of the court in the case of *Doddridge* v. *Thompson*, as to the intent of congress, and the healing operation of the act of 1807 ; nor with the doctrines I contend for in this case. The patent to Charles Bradford, the ancestor of respondents, purports to vest in him a legal title to the land in controversy. If the act of 1807, and subsequent acts of congress referred to, embrace this case, as I think has been clearly shown they do (and the more so, since being healing and remedial acts, their provisions are to be construed liberally), then the benefits of those inure to the heirs or devisees of Bradford. If the title be cured at all by those acts, it is so far cured as to make it a legal title ; for the patent must convey a legal title, if it pass any ; of consequence, if the patents to Charles Bradford convey a legal title, the title of the respondents is a good and valid legal title, to the extent they covenanted to convey. And the ground of complaint on the part of Galloway is gone, and his bill must be dismissed with costs.

I find nothing in the argument, nor in the authorities cited in the argument in the circuit court, to shake my confidence in the legal title of the respondents, as cured by the acts of March 1807, and May 1836. The case of *Dunn* v. *McArthur*, decided in July 1836, so far as the record of the decree discloses, has no bearing upon the question. The case, as stated by the gentleman, might be considered as of some weight. But is he warranted in his statements, by the records. The decree was taken *pro confesso*, and of course, assumed as true, all the allegations made in the bill. The bill undoubtedly contained the allegation, that the entry, location and patent were void, having been made in the name of a deceased person ; and at the time of the filing of that bill (which is evident from the record must have been prior to the act of May 1836), there is as little doubt, that the entry, location and patents were null and void. But by the act of May 1836, they were made good and valid ; and had that act been known and *relied upon at the time of the entering of the decree, it is manifest a different decree would have been the result. It does not appear, that the act of May 1836, was at all relied upon, or that its existence was known ; and it is fairly presumable, that it was not known, as the decree was entered but [*293

a few days after its passage, and the cause was suffered to go off without any defence. I take it, therefore, that the act of May 1836, was not in question ; and the decision, or rather decree, for there was no decision of consequence, has no application to the case under consideration. It could not, any how, be taken as of any force, in the garbled state in which it appears. Had the point been decided, as stated by the complainant's counsel in the circuit court, a full record would have been produced ; and this court would not have been asked to rely upon the bare statement of counsel.

The case of *Blight's Lessee* v. *Rochester*, 7 Wheat. 548, does not impugn the doctrine, that an obligee or covenantee has no right to do any act to prevent his obligor or covenantor complying with his obligation or covenant. The question in that case was one of estoppel. The doctrine of estoppel does not apply to this case, nor does the question at all arise. I am unable to discover the least analogy between that case and this. Had the contract sought to be rescinded in this case never been entered into, but an action of ejectment brought by these respondents against Galloway; and in defence of such action, Galloway had set up his subsequent entry, and the defective entry and survey in the name of Charles Bradford, to defeat the plaintiff's title ; and in answer to that defence, the plaintiffs had insisted upon Galloway's recognition of Charles Bradford's title, by his purchase from one of the heirs of Charles Bradford (Finley Bradford of whom he purchased an undivided moiety), and claimed that he should be thereby estopped from disputing the legality of Charles Bradford's title ; then the case cited from 7 Wheaton might have had some application. But that is not this case. I do not deny, that after the vendee has received his deed, and all the title the vendor can give, he may have the right of purchasing in other interests, to fortify his title. But he shall not be permitted, before he has received a deed, to procure an outstanding title ; and then claim to have his contract rescinded, because, by his own act, he has put it out of the power of the vendor to comply with his covenant or agreement. The utmost he could claim, under any circumstances, I apprehend, would be to have the amount paid for the outstanding title deducted from the purchase-money due ; to make it a ground of annulling *the contract and avoiding the payment of the purchase-money entirely, would be monstrous injustice ; such as I believe a court of equity will never sanction or listen to.

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If it be at all doubtful, whether the respondents have the legal title, in ordinary cases, it is presumable, that Galloway would have applied to the courts, either state or federal, within whose jurisdiction the land lies ; and who would be considered competent, at least, in the first instance, to make a proper application of the principles of the *lex loci rei sitæ*. He, however, has thought proper to resort to another tribunal, and from their decision, he has appealed to the highest tribunal of the Union. To that tribunal, the defendants in error also come, confiding in the justice and honesty of their case ; believing that the great judicial council of the nation will continue to administer justice in equity; and who, although the decree they may make may not settle the controversy, so far as regards the title to the land itself, will yet, by their opinion in this case, re-affirm the great and well-settled principles of the law of equity that must govern this controversy in all its bearings, wherever pursued and wherever determined.

CATRON, Justice, delivered the opinion of the court.—The bill alleges that complainant, on the 11th of March 1835, purchased from Henry H. Finley and David Barr, who acted for himself and wife, the sister of defendant, Finley, the moiety of two tracts of land, lying in the state of Ohio; one for 1200 and the other for 1000, founded on a warrant for 2666⅔ acres obtained by Charles Bradford, as an officer in the revolutionary war, in the Virginia continental line. That Finley, and the wife of Barr, were the heirs of their mother; who derived by descent a moiety of the lands, from her father, Charles Bradford. Galloway agreed to pay $8000 for the moiety of the two tracts, part in hand, and the balance by instalments; the last of which was to fall due on the first of January 1839. And Finley and Barr covenanted with complainant to convey the moiety of the lands contracted for, in fee, so soon as he paid the purchase-money. It is also alleged, Finley and Barr promised, at the time the agreement was made, to forward from Pennsylvania, where they resided, to Galloway, who resided in Ohio, the title papers, and the power of attorney, authorizing Barr to contract for his wife. That after the date of the contract, the wife of Barr died, a minor, [*295 intestate, of course, and without issue. As grounds of relief, it is averred, that the title-papers were not forwarded, nor the power produced. But principally, that after making the contract, the complainant discovered, Charles Bradford, the grantee, had died in 1789; and that the lands were entered, surveyed and granted in his name, in 1793 and 1794.

Finley and Barr, by their answer, admit the contract to have been made as stated; deny that title-papers were to be furnished by them; admit, they promised to forward the power, and the death of Mrs. Barr, but allege, respondent, Finley, was her sole heir; admit, Charles Bradford died in 1789, and that the lands were entered and surveyed in 1793, '94, and afterwards patented in his name. The respondents, however, mainly rely for their defence on the fact, that on the 26th of September 1835, the complainant, Galloway, entered the two tracts of land, the moiety of which was agreed to be conveyed, in his own name, and, as they allege, without their knowledge, and with the fraudulent intent of depriving the heirs of Bradford of it; and thereby to render it impossible for them to comply with their contract. And the defendant, Finley, for himself, and as heir of his sister, offers to comply with the agreement.

It is urged, the entries, surveys and grants, in the name of Charles Bradford, after his death, were void. Suppose, the fact to have been so, when the agreement of March 1835 was made, and that the lands were subject to appropriation when Galloway entered them, in September 1835, then the rule applies—"That if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title." *Searcy* v. *Kirkpatrick*, Cooke (Tenn.) 211; *Mitchel* v. *Barry*, 4 Hayw. 136. In reforming the contract, equity treats the purchaser as a trustee for the vendor, because he holds under the latter; and acts done to perfect the title by the former, when in possession of the land, inure to the benefit of him under whom the possession was obtained, and through whom the knowledge that a defect in the title existed, was derived. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title. 3 Pet. 48; 2 A. K. Marsh. 242; 5 Yerg. 398. This case

furnishes a fair illustration of the propriety of the principle. Charles Bradford was a non-resident; that he had died, before the *lands were
*296] entered and granted, was unknown to Galloway, until he obtained the information through the heirs of the grantor, after the sale; for forty years, the title had been deemed valid, and the defect was exposed by the production of his will, and the indorsements of its probate, in 1789. The fact, thus ascertained, was confidential in its character, as between the parties to the contract; and Galloway could not be permitted to avail himself of it, whilst standing in the relation of a purchaser, to defeat the agreement; under the most favorable circumstances, he could only have it reformed, and the amount advanced to perfect the title deducted from the unpaid purchase-money. But this is not the attitude the complainant assumes, by the bill first filed; he claims an entire rescission.

On the 20th of May 1836, pending the suit, congress passed an act (5 U. S. Stat. 31), to give effect to patents issued to deceased persons, which provides, "that grants issued to persons who had previously died, should inure to and become vested in the heirs of such deceased patentee, as if the same had issued to the deceased person, during his life; and that the provisions of the act should be construed to extend to patents for lands within the Virginia military district, in the state of Ohio. That the legal title to the lands patented in the name of Charles Bradford, vested in his heirs, by force of the act, cannot be denied. 9 Cranch 43; 2 Wheat. 196. Grant then, all that is claimed for the complainant; still, his entries of September 1835, conferred a mere equity, and the defendant, Finley, holds the fee; and the complainant, by raising the warrants from his entries, will have sustained damage only to the amount of the officer's fees; or take it the other way, and compel Finley and Barr to compensate for the warrants; then, of course, they would be entitled to them, and the effect be the same. Had Galloway's entries been valid, and had he acted in good faith as regards the defendants, by giving notice of the means used to perfect the title; and had he sought by the bill, what in equity and conscience he was entitled to, as compensation, a court of chancery could not have refused relief; but he invokes aid to defeat the entire contract, and nothing less, in sanction of acts intended, from his own showing, to deprive the complainants of their money and lands; thus assuming an attitude before the court, and asking its active aid, under circumstances, that, were he a defendant, and set up like claims, it would be difficult to say, he could be compensated; as a complainant, he surely cannot be heard.

*297] *Then, as to the loss of the warrants and fees: it having been the clear duty of the appellant to enter the lands for the benefit of his vendors, and only to have demanded compensation for expense and trouble; and he having entered for himself; a court of equity must decline to assist him (in the language of Mr. Justice Story, 2 Story's Eq. 8) to escape from the toils which he has studiously prepared to entangle others; it must be left to him to get rid of his entries, and secure the benefit of his warrants. The act of congress having conferred on the defendant, Finley, the legal title, equity will not take from him his legal advantage. 1 Wheat. 196; 2 Story's Eq. 88; Sugden on Vendors, 365, 275, (7th ed.). If Finley has the title, and can perform the contract, on the 1st day of January 1839, when the last payment falls due, this is all the law can require of him. Yet it is

an established rule in equity, that where the vendor has not the power to make title, the vendee may, before the time of performance, enjoin the payment of the purchase-money, until the ability to comply with the agreement for title is shown (*Boyer* v. *Porter*, 1 Overt. 258; *Ralston* v. *Miller*, 3 Rand. 44); but then, the court will give a reasonable time to procure the title, if it appears probable, on reference, that it may be procured. *Frost* v. *Brunson*, 6 Yerg. 36, 40.

By an amendment to his bill, in October 1836, the complainant sets forth his entries of 1835, and the surveys thereof, and again prays a rescission of the contract of March 1835; "or, that if the defendants, at the date of the contract, had a good and perfect title to the premises they contracted to convey, and authority to perfect their agreement; then the complainant is ready, and tenders a completion of the contract." The only allegation in the amended bill, varying the case, is, that at the time the agreement was entered into, complainant was ignorant that the patents for the lands had been made in the name of a person that was dead. The respondents admit the fact; but state that complainant derived his first knowledge of its existence from a sight of Charles Bradford's will, after he made the agreement. It seems, respondents were at that time equally ignorant, not knowing, or having overlooked, the dates of the entries and patents. If complainant had not entered the lands, then he would have been entitled to a rescission of the contract, had no title been acquired by the defendants, through the medium of congress.

The principal ground relied on for relief being, that the patents [*298
*were void, because made after Charles Bradford's death, we will proceed to examine it. That a patent, thus made, passes no title, is true, in the nature of things; there must be a grantee, before a grant can take effect; and so this court held, in *Galt* v. *Galloway*, 4 Pet. 345, and *McDonald* v. *Smalley*, 6 Ibid. 261. Yet this is not the question presented; it is, whether the appellant was permitted to enter the lands, purporting to have been granted to Charles Bradford, notwithstanding his death? And this depends upon the act of 1807, ch. 34, and others, continuing the provision up to the date of Galloway's entries. The time for locating Virginia military claims for services on the continental establishment, between the Little Miami and Scioto rivers, had expired; and by the act, congress extended the time. But on re-opening the land office, the following exception was introduced: "Provided, that no locations as aforesaid, within the above-mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for lands located contrary to the provisions of this section, shall be considered null and void."

It is insisted, for appellant, that the section had reference to imperfect, and not void titles. The legislature merely affirmed a principle not open to question, if this be the true construction. Had an effective patent been issued, the government would not have any title remaining, and a second grant would have been void, of course. Something more, undoubtedly, was intended, than the protection of defective, yet valid, surveys and patents; this is not denied, but the argument insists, only irregularities were intended to be covered. It is difficult to conceive how an *irregular* patent could exist, unless it passed no title. We will not perplex the decision with sup-

posed cases of irregular surveys, but examine the act of congress, and ascertain its effect as regards the grant in the name of Charles Bradford. It is fair, upon its face, and we will not look behind it for irregularities. 7 Wheat. 214. The death of the grantee is an extrinsic fact, not impairing the equity of the claim, as against the government. His heirs had an interest in common, in the military district, with all similar claimants. The truth of the position is unquestionable. *Jackson* v. *Clarke*, 1 Pet. 635; *University* v. *Cambreling*, 6 Yerg. 79; *Neal* v. *East Tennessee College*, Ibid. 190. The defects, of all others most common, in the military grants of Kentucky, Tennessee and Ohio, were, where the soldier had died, and the entry, survey and grant *had been made in the name of the deceased. In his name, the warrant almost uniformly issued; who the heirs were, was usually unknown to locators, and disregarded by the officers of government, when perfecting titles. In Tennessee and Kentucky, provision was made, at an early day, that the heir should take by the grant; and why should we presume congress did not provide for the protection of his claim to the lands purporting to have been granted; when the legislation of the federal government was, of necessity, controlled in this respect, by the experience of members coming from states where there were military lands? The statute is general, including, by name, all grants, not distinguishing between void and valid; and the plainest rules of propriety and justice require, that the courts should not introduce an exception, the legislature having made none. 1 Pet. 636, 638; Mart. & Yerg. 361.

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But it is insisted, this court did make an exception, in the cause of *Lindsey* v. *Miller*, 6 Pet. 666; and which should be followed. What was that case? A grantee from the government sued a defendant, in ejectment, claiming, in the military district of Ohio, by virtue of an elder entry and survey; and the question was, whether the junior patent to plaintiff was void, because made contrary to the act of 1807. The defendant's entry, by mistake, had been founded on a warrant for services, not in the continental line, but in the Virginia state line; a claim not subject to be satisfied in the Ohio military district. 7 Wheat. 1. The location and survey were, therefore, mere nullities; and the court very justly held, that congress did not, by the act of 1807, contemplate such claims, and that they were not within the purview of the act. But had the claimant been entitled to the satisfaction of his warrant, in the military district, in common with others, for whom the government held as trustee, the case might have been very different, even had the entry and survey been invalid. Congress had the power, in 1807, to withhold from location any portion of the military lands; and having done so, in regard to that previously patented in the name of Charles Bradford, the complainant, Galloway, had no right to enter the same. His location being void, it follows, the act of 20th May 1836, vested the title to a moiety in the defendant, Henry H. Finley, exempted from any influence of the entries. The decree of the circuit court is therefore affirmed, and the bill ordered to be dismissed.

Decree affirmed.

*Henry Toland, Plaintiff in error, *v.* Horatio Sprague.

Jurisdiction.—Foreign attachment.— Waiver.—Limitation.—Merchants' accounts.—Account stated.—Pleading.

Process of foreign attachment cannot be properly issued by the circuit courts of the United States, in cases where the defendant is domiciled abroad, or not found within the district in which the process issues, so that it can be served upon him.[1]

The true construction of the 11th section of the judiciary act of 1789, is that it did not mean to distinguish between those who are inhabitants, or found within the district, by process issued out of the circuit court, and persons domiciled abroad: so as to protect the first, and leave the others not within the protection; but even with regard to those who are within the United States, they should not be liable to the process of the circuit courts of the United States, unless in one or other of the predicaments stated in the clause. And as to all those who were not within the United States, it was not in the contemplation of congress, that they would be at all subject, as defendants, to the process of the circuit courts; which, by reason of their being in a foreign jurisdiction, could not be served upon them; and therefore, there was no provision whatsoever in relation to them.

By the general provisions of the laws of the United States: 1. The circuit courts can issue no process beyond the limits of their districts: 2. Independently of positive legislation, the process can only be served upon persons within the same districts. 3. The acts of congress, adopting the state process, adopt the form and modes of service only, so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts: 4. The right to attach property to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the circuit court, *in personam;* that is, where they are inhabitants, for found within the United States: and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here.

In the case of a person being amenable to process *in personam*, an attachment against his property cannot be issued against him, except as a part of, or together with, process to be served upon his person.

The circuit court of each district sits within and for that district, and is bounded by its local limits; whatever may be the extent of the jurisdiction of the circuit court over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union; it has not done so; it has not, in terms, authorized any civil process to run into any other district, with the single exception of *subpœnas* to witnesses, within a limited distance. In regard to final process, there are two cases, and only two, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons in another district of the same state; and the other, in favor of the United States, in any part of the United States.

A party against whose property a foreign attachment has issued in a circuit court of the United States, although the circuit court had no right to issue such an attachment, having appeared to

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[1] It is now provided by statute, that in common-law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided by the laws of the state in which such court is held, for the courts thereof; and such circuit and district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held, in relation to attachments and other process; provided, that similar preliminary affidavits or proofs, and similar security, as regarded by such state laws, shall be first furnished by the party seeking such attachment or other remedy. 1 R. S. § 915; Act of 1872, 17 U. S. Stat. 197. In Guillou *v.* Fontain, it was said by Judge McKennan, that so far back as 1809, at least, it was the practice of the federal courts, in Pennsylvania, to issue writs of foreign attachment, in accordance with the laws of the state; and that whatever doubt was thrown upon this question, by the case of Toland *v.* Sprague, must be considered as settled by the above legislation of congress. 8 Chicago Leg. News 25. And see North *v.* McDonald, 1 Bliss. 57. But see Dormitzer *v.* Bridge Co., 6 Fed. Rep. 217; Anderson *v.* Shaffer, 10 Id. 266.

the suit, and pleaded to issue, cannot afterwards deny the jurisdiction of the court; the party has, as a personal privilege, a right to refuse to appear; but it is also competent to him to waive the objection.

*301] *The judiciary act of 1789 authorizes the supreme court to issue writs of error to bring up final judgments or decrees in a civil action, &c.; the decision of the circuit court upon a rule or motion is not of that character; such decisions are not final judgments.

No principle of law is better settled than, that to bring a case within the exception of merchandise accounts, between merchant and merchant, in the statute of limitations, there must be an account; and that, an account open or current; that it must be a direct concern of trade; that liquidated demands on bills and notes, which are only traced up to the trade or merchandise, are too remote to come within this description. But when the account is stated between the parties, or when anything shall have been done by them, which, by their implied admission, is equivalent to a settlement, it has then become an ascertained debt. Where there is a settled account, that becomes the cause of action, and not the original account; although it grew out of an account between merchant and merchant, their factors or servants.

T. shipped a quantity of merchandise, by P., to Gibraltar, who, on arriving there, placed the goods in the hands of S., and received advances from S. upon them; in 1825, S. sold the goods and transmitted an account-sales, as of the merchandise received from P., to T., who received it in September 1825, stating the balance of the proceeds to be $2578; T., in 1825, wrote to S., directing him to remit the amount to him, deducting $1000, which had been advanced by S. on the goods, and which had been remitted by P. to T.; S. refused to make the remittance, alleging that P. was largely indebted to him. No suit was instituted by T. against S., until August 1834: the account was a stated account; and the statute of limitations applied to it.[1]

The mere rendering an account does not make it a stated account; but if the other party receives it, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him, then it becomes a stated account. It is not at all important, that the account was not made out between the plaintiff and the defendant; the plaintiff having received it, having made no complaint as to the items or the balance; but, on the contrary, having claimed that balance, thereby adopted it, and by his own act, treated it as a stated account.

T. shipped merchandise consigned to P., as supercargo; P. put the goods into the hands of S., a merchant of Gibraltar, as the merchandise of T., and received an advance upon them; S. having sold the merchandise, rendered an account of the sales, stating the sales to have been made by the order of P., and crediting the proceeds in account with P.; the account came into the hands of T., in 1825; and he claimed the balance of the proceeds from S., deducting the advance made by S. to P.; and payment of the same was refused to P.: *Held*, that as T. had a right, in 1825, to call on S. to account, and as no suit was instituted against S., until 1834, S. having always denied his liability to T. for the amount of the sales, from the time of the demand, the statute of limitations was a bar to an action to recover the amount from S.

The effect and nature of an averment in a plea put in by a defendant, when it is not essential to the plea.

Where the items of an account stated were not disputed, but were admitted, and payment of the same demanded; it was not taking the question of fact, whether the account was a stated account, from the jury, for the court to instruct the jury, that the account was a stated account.

*302] *Error to the Circuit Court for the Eastern District of Pennsylvania. This action was commenced on the 5th day of August 1834, by the plaintiff in error, by process of foreign attachment, in the circuit court for the eastern district of Pennsylvania. The writ of attachment stated the defendant, Horatio Sprague, to be a citizen of the state of Massachusetts, and the plaintiff to be a citizen of the state of Pennsylvania. The attachment was served on the property of the defendant, on the 6th day of August 1834, in the hands of John McCrea, S. Brown and P. Lajus, residents in the city of Philadelphia. At the following term of the circuit

[1] See note to the case of Spring *v.* Gray, 6 Pet. 151.

court, the counsel for the defendant moved to quash the attachment; which motion was overruled by the court.

The record showed, that Horatio Sprague, although stated to be a citizen of the state of Massachusetts, was, at the time of the commencement of the suit, and for some years before, had been, a resident at Gibraltar, where he was extensively engaged as a merchant. The defendant entered special bail to the attachment; and having appeared and pleaded to the same, the case was tried by a jury on the 21st day of November 1836; and a verdict, under the charge of the circuit court, was rendered for the defendant, on which a judgment was entered by the court. The plaintiff, at the trial, took a bill of exceptions to the charge of the court, stating in full all the evidence given to the jury in the case. The plaintiff prosecuted this writ of error.

The plaintiff declared in *assumpsit*, on three counts, against the defendant: 1st. Charging the delivery of certain articles of merchandise, upon a promise to account and pay over the proceeds of the sale of the same; alleging a sale thereof by the defendant, and a breach of promise, in not paying or accounting for the same. 2d. A count in *indebitatus assumpsit*. 3d. On an account stated. The third count was, afterwards, on the application of the plaintiff to the court, stricken out of the declaration. The defendant pleaded the general issue, and also the statute of limitations. The plaintiff replied, that, at the time of the transactions with the defendant, on which this suit was brought, the defendant was a merchant, and the factor of the plaintiff, and "as such had the care and administration of the money, goods, wares and merchandise, in the said declaration mentioned, of the said Henry; and to merchandise and made profit *of, for the said Henry, and to render a reasonable account to the said Henry, when he, the said [*303 Horatio, should be thereunto afterwards required; and that the said money, in the said several promises and undertakings in the said declaration mentioned, became due and payable on trade had between the said Horatio and the said Henry, as merchants, and merchant and factor, and wholly concerned the trade of merchandise between him, the said Henry, as a merchant, and the said Horatio, as a merchant, and factor of him, the said Henry, to wit, at the district aforesaid; and the said Henry further says, that no account or accounts whatever of the said money, goods and merchandise, in the said declaration mentioned, or any part thereof, was, or were ever, stated, settled or adjusted between him and the said Henry."

To this replication, the defendant rejoined, stating that he was not the factor of the plaintiff; nor did the said money, in the said several supposed promises and undertakings, in the said declaration mentioned, become due and payable in trade had between the said Horatio Sprague, and the plaintiff, as merchant, and merchant and factor, in manner and form as the plaintiff had alleged.

The bill of exceptions set out at large the evidence given on the trial of the cause. It consisted of a letter, dated, Philadelphia, September 25th, 1824, from the plaintiff to Charles Pettit, by which certain goods and merchandise, the property of the plaintiff, shipped on board of the William Penn, bound to Gibraltar, was consigned to him for sale, and stating the manner in which returns for the same were to be made; letters from Charles Pettit to the plaintiff, relative to the shipment, and a statement of remit-

tances made to him by Charles Pettit, with an account-sales of some of the merchandise; also two bills of exchange, one for $530.17, the amount of the proceeds of sales of eleven hogsheads of tobacco, and a bill of exchange for $1000, both drawn by Horatio Sprague, the defendant, on persons in the United States, to the order of Charles Pettit, and by him indorsed to the plaintiff.

By a letter from Charles Pettit to the plaintiff, dated at Gibraltar, December 1824, after communicating the sales of the eleven hogsheads of tobacco, and the inclosure of the bills, and stating that the bill for $1000 was to be considered as an advance on his shipment, he informed the plaintiff: "I shall sail from this to-morrow, in the ship William Penn, for Savannah, and have left the following instructions with my friend,
*304] *Mr. Sprague, regarding your property left by me in his hands: 'With respect to the gunpowder tea, cassia, and crape dresses, shipped by Henry Toland, you will please to dispose of them as you may think most for the interest of the shipper, and remit the amount to him, in bills on the United States; forwarding me account of sales of the same.'"

By a letter addressed by Charles Pettit to the defendant, Mr. Sprague; written at Gibraltar, on the 18th December 1825; he says, among other things: "By your account-current, rendered this day, a balance stands against me of $5574.31; to meet which you have in your possession 550 barrels superfine flour, on my account entire, my half interest of 372 barrels flour; an invoice of crapes, &c., amounting to $2020; 100 ten-catty boxes gunpowder tea; 500 bundles cassia; and two cases super satin Mandarin crape dresses, containing 101 dresses. With respect to the gunpowder tea, cassia, and crape dresses, shipped by H. Toland, you will be pleased to dispose of them as you may think most for the interest of the shipper, and remit the amount to him, in a bill on the United States; forwarding me account-sales of the same."

On the 6th of January 1825, the plaintiff wrote to the defendant, from Philadelphia, "I am expecting soon to hear the result of my shipment by the William Penn, and hoping it will be favorable." On the 22d February 1825, the plaintiff addressed the following letter to the defendant:

"Philadelphia, February 22, 1825.

"Mr. Horatio Sprague, Gibraltar.

"Dear Sir:—By the ship William Penn, I consigned to Mr. Charles Pettit, 100 boxes gunpowder tea, a quantity of cassia, 11 hogsheads Kentucky tobacco, and two cases Mandarin robes. I directed Mr. Pettit to make the returns of the shipment, *immediately* on his arrival at Gibraltar, as follows: If quicksilver could be had at forty cents, then the whole amount in said article; if not, to ship the whole amount in dollars, by the *first* vessel for this port, or New York; or if good bills on the United States could be had on more favorable terms for a remittance, then to make the return in bills. Mr. Pettit promised a strict compliance with all these things; but
*305] since the *sailing of the William Penn from this port, I have never received a line from him. I have heard of his arrival in Savannah, and of his proceeding to Charleston; but I have not yet been favored with a single letter from him. As my property may be left in your hands by him, unsold, I beg of you to follow the directions given to him, as herein

detailed, and make the remittance direct to me. I have particularly to beg your attention to this matter, and to remit as early as possible."

The bill of exceptions also contained letters from the defendant to the plaintiff, written at Gibraltar, commencing on the 18th January 1825, to February 22d, 1827; and other correspondence of the plaintiff with the defendant, up to an anterior date. The letters of the plaintiff asserted the liability of the defendant to him for the whole amount of the shipment made to Charles Petit; deducting the two bills of exchange; one for $530.17, and the other for $1000; the balance of the sales being $1579. The letter from the defendant to the plaintiff, of the 18th January 1825, informed the plaintiff, "that Charles Pettit had left Gibraltar, on the 19th of December, and had placed in his hands, for sale for his account, an invoice of gunpowder tea, cassia and crape dresses; with directions to dispose of them as he may judge most for his interest; which shall have my best attention." Letters written afterwards informed the plaintiff of the state of the markets at Gibraltar; and on the 7th of June 1825, the defendant wrote to the plaintiff, "I have closed the sales of the crapes and cassia, left by Mr. Pettit some time since; and settled his account."

On being informed by the plaintiff, that he was held liable to him for the proceeds of the shipment *per* the William Penn, the defendant addressed the following letter to the plaintiff:

"Gibraltar, October 24, 1825.

"Dear Sir:—I have just received your letter of 12th September, which I hasten to reply to, It would appear by your letter, that Mr. Pettit's agency here was not so full as his own instructions to me gave me to expect. The property which he has brought and consigned to me, at various times, has ever been delivered over to me with invoices, in his own name; and I have ever been punctilious in following his instructions, sometimes in remitting to one, sometimes *to another, and on which property I was always ready, and at various times did advance sums of money; but [*306 how he, Mr. Pettit, appropriated this money, it was not my province to inquire; he might have remitted it to you, or any one else. Here follows the other part of his instructions, of the date of the 18th December, which you appear to have overlooked; but which must establish in your mind the nature of Mr. Pettit's transactions here. Had you have consigned your property to me, instead of Mr. Pettit, I should then have been accountable to you; but it cannot be expected, that I am to guaranty the conduct of your agent, who always is accountable to you for his conduct. Here follows the extract of his order of 18th December 1824: 'By your account-current, rendered this day, a balance stands against me of $5574.31; to meet which, you have in your possession 550 barrels of superfine flour, on my account entire, my half interest of 372 barrels of flour, and invoice of crapes, &c., amounting to $2020, one hundred ten-catty boxes gunpowder tea, five hundred bundles cassia, and two cases superior satin Mandarin crape dresses, containing one hundred and one dresses,' &c. This paragraph, I repeat, cannot but convince you that all my advances to Mr. Pettit were on the various property which he placed in my hands for sale. It is very true, I corresponded with your good self, on the subject of the articles which you intrusted to the management of Mr. Pettit; and it is no less true, I did the same with him, and from time to time promised him account;

which I never did to you; and, until his last visit to this, did not close the sales of the articles, when, at his particular request, closed every account before he left this. This explanation, I trust, will prove satisfactory, so much so, that I may continue to enjoy your confidence."

The letter of the plaintiff, of Philadelphia, January 4th, 1826, repeated and insisted on the liability of the defendant to him; to which the defendant gave the following reply:

"Gibraltar, February 10, 1826.

"Dear Sir:—I am this moment in recipt of your letter of 4th ultimo, per Charles, and from your reference to my letter of 18th January 1825 have looked into the same. That I was aware the property handed over to me by Mr. Pettit did not belong to himself, there is no question; but
*307] on what terms you and others consigned it *to him, is not for me to inquire. On his arrival, he submitted to me invoices of several shipments, required advances, and gave orders for sales; and on his leaving this, as you may suppose, directed me to correspond with the different shippers by him; which, in my opinion, was very proper, and could not in the faintest degree lessen my claim to the property, on which I had made liberal, yes, more than liberal, advances; so much, so, that Mr. Pettit is over $2000 my debtor; yet so particularly desirous am I to satisfy your mind, as I am in possession of all the original papers, letters, &c., connected with the business, I have no hesitation in submitting the question to any two respectable merchants here, one to be appointed by you, the other by myself, and to their decision I shall most readily subscribe; or if you are willing to leave the business to me, I will submit *every* paper to two disinterested merchants, and they shall address you on the subject; and the affair shall be settled to our satisfaction. Herewith, duplicate of my respects of 28th ultimo, since which I have delivered a part of your hyson skin tea, at three and a half rials per pound. This parcel has been sold off, and if no complaints of its quality be made hereafter, I shall be glad."

The bill of exceptions also contained a number of accounts-sales of merchandise made by the defendant, by order of Charles Pettit; and accounts-current with him, commencing in 1822. The only account which was the subject of notice in the charge of the circuit court, was one dated at Gibraltar, June 30th, 1825, of the property of the plaintiff left in the hands of the defendant, on the 18th December 1824. This was an account-sales, showing a balance of $2578.11. The account sales was stated to be:

"Sales of merchandise, received 3d November 1824, *ex* ship William Penn, William West, master, from Philadelphia, by order of Mr. Charles Pettit, for account and risk of the concerned, *per* Horatio Sprague, Gibraltar. Gibraltar, June 30, 1825."

By the account-current between the defendant and Chares Pettit, dated "July 6th, 1825," in which credit was given for the net proceeds of the sales of June 30th, 1825, a balance appeared to be due from Charles Pettit to the defendant, of one thousand four hundred and six dollars and —— cents. The bill of exceptions contained no other account in which the
*308] *sales of the shipment made by the plaintiff by the William Penn were stated; nor did it contain any account rendered by the defendant to the plaintiff, relating thereto.

The circuit court charged the jury: That there being a plea of the statute of limitation, the plaintiff must, by his replication, bring himself within the exception concerning merchants' accounts in the said statute, or must fail. To be within the said exception, such accounts must concern trade and merchandise, and must also contain mutual demands, and must be an open and running account, and must be such for which an action of account would lie; and must be between merchant and merchant, their factors or servants, not merely between those who hold their goods under an obligation to account. Here, the plaintiff claimed $1579, the balance of sales of property, as *per* account-sales, June 30th, 1825, amounting to $2579. Credit by $1000—bill on Pearson. The plaintiff and defendant agree in the amount of sales, and no item is objected to. Thus far the account is a stated one, not being objected to for ten years; if any balance is due, it is ascertained by mutual consent.

There is no mutual account between them, nor an open one, and there can be no new account open between them. The contest does not depend on an account, but on who has a right to a liquidated balance, admitted by defendant to be in his hands as the proceeds of plaintiff's property; plaintiff claims it as his own; the defendant claims to apply it to a debt due by Pettit. On the pleadings, the question is not who has a right to the money; but whether plaintiff is not barred out by the statute. The plaintiff has not made out a case which exempts him from the statute. If Sprague had rendered the account-sales to the plaintiff, and admitted the balance to be payable to him, that would not bring plaintiff within the exception. The plaintiff had a complete right of action, on demand of a settled balance; and he made this demand in 1825, and the statute would then begin to run. The plaintiff's only claim is for a precise balance; and this would not have been the mutual account-current between merchant and merchant, concerning the trade of merchandise between plaintiff and defendant. It did not become so, by defendant claiming to retain the balance for Pettit's debt; nor did it change the *nature of the transaction, or make the cause more a matter of account, than if he admitted the plaintiff's right to it. The [*309 only question is, who is entitled to the balance of a settled account. Admitting, then, that defendant was the factor of the plaintiff, he has failed in making out his replication as matter of law; it was not a case of trust, not embraced by statute.

Taking the account, then, as one where defendant was factor for plaintiff, bound to account to him, and pay him the balance, and having no authority to apply the proceeds to Pettit's debt, and plaintiff not bound by receipt of $1000: the nature of the transaction does not bring it within the exception, being for a liquidated balance admitted; and by the correspondence between the parties, the controversy brought to a contest for the balance, this can be an exception only on the ground of merchants being privileged characters. The correspondence between the parties, so long ago as early in the year 1826, shows that the question between them was not about the account, or any item in it, but on the right of Mr. Sprague to retain the admitted balance, to repay the advances he made to Pettit: that was the only question in dispute between them; and it is the only one now, and has so continued for more than ten years. This view makes it unnecessary to consider the other interesting questions as to the powers of

agents, factors, supercargoes, pledgees, and of sub-agents ; the jury are to take the direction of the court in the question, which is a matter of law : and so left the same to the jury.

The case was argued by *Gilpin* and *Hare*, for the plaintiff in error ; and by *Gerhard*, with whom was *Coxe*, for the defendant.

For the plaintiff, the following errors were assigned : 1. That the court charged the jury upon an issue which not only did not appear upon, but was excluded by the pleadings ; upon which the cause was not tried ; and which was not raised by any of the counsel in argument. 2. That whether any demand for an account had ever been made, by plaintiff upon defendant ; whether any account had ever been rendered by defendant to plaintiff ; and whether any account was an account stated between plaintiff and
*310] defendant, were all questions for *the jury ; and that the court erred in withdrawing the same from the jury, and giving them a positive direction thereon. 3. That supposing the questions set forth in the foregoing error assigned, to be for the court, the court erred in charging the jury, that, in point of law, there was any demand made on defendaut by plaintiff for an account ; that the defendant had ever rendered an account to the plaintiff ; and that there was an account stated between the plaintiff and the defendant, so as to deprive the plaintiff of the benefit of the exception in the statute of limitations concerning merchants' accounts. 4. Because the charge of the court was against the law and the evidence.

Hare, for the plaintiff in error :—The defendant in error objects to this court's jurisdiction, as well as to that of the court below, on the ground, that he is within the 11th section of the judiciary act of 1789, which enacts, that "no civil suit shall be brought in the circuit courts against an *inhabitant* of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." This question was raised in the court below, by means of a rule to show cause why the writ should not be quashed, and decided against the defendant, after argument, and on affidavits, showing that the defendant was a citizen of Massachusetts, and had been for more than twenty years an inhabitant of Gibraltar.

We contend : 1. That the matter of such a defence, as it ousts the court below, or this court, of its jurisdiction, by reason of a personal privilege, must be duly pleaded ; and if waived in the order of pleading, is lost. 2. That the defendant, not being an inhabitant of the United States, but residing in another country, is, therefore, not within the 11th section, and is liable to foreign attachment.

1. As to the first point, the 11th section confers a personal privilege which, like all other personal exemptions, must be pleaded ; because his right to it is examinable, and nothing appears on the record to found a doubt of the jurisdiction. And as it is a personal privilege, it may be waived, in which case the court has jurisdiction. As it is merely dilatory, it is not to be favored. *Harrison* v. *Rowan*, Pet. C. C. 489 ; *Kitchen* v.
*311] *Williamson*, 4 W. C. C. 85 ; **Logan* v. *Patrick*, 5 Cranch 288. And having pleaded in bar, he cannot now raise the question of his privilege in this court.

2. It appeared, upon affidavit in the court below, that the defendant is

not an inhabitant of the United States, has not been such for twenty years, but is domiciled in Gibraltar. He is not, therefore, within the words or meaning of the 11th section; which covers none but inhabitants of the United States. The judiciary act gives to the circuit court cognisance of all suits of a civil nature, between citizens of different states; which is the case of the parties to this action; or citizen and alien. And the act to regulate processes gives to the same courts the same processes as are used in the state courts of the particular district. The process in this case was a foreign attachment, which is used in the state courts of Pennsylvania. The 11th section restrains the service of process upon an inhabitant of the United States, except in his own district, or in that where he is at the time of writ served.

Where a general power is given, and a particular restriction afterwards imposed, the restriction must be construed strictly, or it may override the power. Here, the character of the process and that of the suit are within both acts. The question, then, is on the restriction: but the defendant is not an inhabitant of the United States, and therefore, not within it. The spirit of the restriction was to save inhabitants of the United States, whether citizens or aliens, from a greater hardship than either would be subjected to in the state courts; that, namely, of being called to answer in a distant tribunal, by virtue of the general power of the federal courts, as extending all over the Union. But this consideration cannot apply to the case of foreign attachment against a non-resident, since that process is used in the state courts; and would have lain against this defendant, and cannot lie against an inhabitant of the state or district. If the attachment had issued from the state courts, the defendant might have transferred it to the circuit court by the terms, of 12th section of the judiciary act. 3 Harr. & McHen. 556–7.

It has been the practice in Pennsylvania, to issue foreign attachments from the circuit courts, against aliens non-resident. The word *inhabitant* in the act does not mean *citizen*. If so, aliens resident would be exposed to a hardship from which citizens are exempted. The argument for the defendant must mean, that, *because the defendant is a citizen of Massachusetts, he is, therefore, an inhabitant of the United States; that is, [*312
that inhabitant and citizen are the same thing. In some cases, it is true, the residence of a citizen of the United States within the United States, determines of what state he is a citizen, as to the question of jurisdiction of the United States' courts; as in *Cooper* v. *Galbraith*, 3 W. C. C. 553; *Butler* v. *Farnsworth*, 4 Ibid. 101. But in this case, the citizen of the United States is an inhabitant of another country. He is not thereby divested of his citizenship; which signifies his political relations, and does not depend on his will. 2 Cranch 318; *United States* v. *Gillies*, Pet. C. C. 161; 4 Tuck. Black. 101; 4 Am. Law Journ. 462; 2 Cranch 120; 8 T. R. 45; Hale's Com. Law 184; Vatt. 162, 318. But he is not an inhabitant of the United States; he is such of another country; and he is to be dealt with as such, in a question of jurisdiction in this court. 2 Pet. 450; 2 Rob. Adm. 267; 3 Ibid. 23; 2 Bos. & Pul. 229; 1 Binn. 351. And if foreign attachment will lie against an alien non resident of this country, there is no reason why it should not lie against a citizen non-resident. If pleaded, that he was an inhabitant of the United States, and issue had been joined, the verdict

must have been that he was not an inhabitant; and if so found, there is nothing to take away the jurisdiction of the circuit court.

The first error is, that the court charged upon an issue not only not appearing upon, but concluded by the pleadings. The charge of the court assumes, that there had been an account stated between the plaintiff and defendant. None was alleged at the trial. The action was for the proceeds of a shipment, placed in the hands of the defendant, by the plaintiff's agent. The merits were not noticed in the charge of the court, and are, therefore, not material. The statute of limitations was not relied on by the counsel for the defendant at the trial. The case was tried upon the issues, and we contend the charge was upon what was not in issue.

The declaration contains two counts; for money had and received, and for not rendering an account. There was originally a third count, viz., on an account stated; which was stricken out, before replication, upon a rule granted by the court. The defendant pleaded *non assumpsit*, and the statute of limitations; which, in Pennsylvania, by a defect of legislation, does not save the right of the plaintiff against an absent defendant. *The plaintiff took issue on the first plea; and to the second, replied the exception in the statute concerning merchants' accounts; and alleged in it, that no account had ever been rendered or stated between the parties. *Godfrey* v. *Saunders*, 3 Wils. 79; 1 Burr. 317, 557–8; 9 Serg. & Rawle 293. It being a construction of this exception, that it does not include accounts stated, it is proper to allege, they were not stated. The defendants rejoined, that plaintiff and defendant were not merchants, &c. It admitted, therefore, there was no account stated, as it did not deny it; for, whatever is traversable, and not traversed, is admitted. 2 Stark. 62; Stephen on Pleading, 255, 258, app'x 44, 54. The verdict, if stated at large on the record, would have been, that the parties were merchants, which, as a fact, was not doubted. If stated at large, "under the direction of the court," as expressed in the record to have been found, it must have been, that there was an account stated between the parties. But it is a rule, that a verdict cannot contradict the issue nor admissions in the pleadings. 5 Bac. Abr. 322; 2 Mod. 5; 2 Ld. Raym. 864. The learned judge, therefore, clearly erred, when he charged the jury that the question in the pleadings was, whether an account had or had not been stated; since such a verdict would have been a nullity. Upon the issue, the plaintiff proved the amount owing to him, by the written admission of the defendant, which admission did not include the right of the plaintiff to that amount. If the rejoinder had been, that there was an account stated, his course would have been different, and it would have lain on the defendant to prove such an account; which attempt, if it failed, would have destroyed his defence on the merits.

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The second error assigned is, that the court took away from the jury the question, whether there was or was not an account stated; and charged positively, that a particular paper was such. The replication denied an account stated; the rejoinder admitted there was none; and none was alleged or produced in evidence. The plaintiff was entitled to be heard against the construction of any paper, as such account. The court charged, that the account-sales of June 30th, 1825, was an account stated between the parties; and did not state that that account was not sent by defendant to plaintiff, but was given by defendant to Pettit, who was not then the plaintiff's agent;

that the defendant always denied his liability to account to the plaintiff; *and affected to treat Pettit as the owner of the goods; and that the account was given by Pettit to the plaintiff, as showing what disposition he had made of the goods. We contend, that this was not an account stated, in point of fact; and that the jury were the judges of the character of the paper: for it was not a question of the construction of a paper; nor of the meaning of a phrase; but of a fact, whether this paper was sent, and received, as an account stated; and it was a matter of argument to the jury, whether an account-sales can be, in any case, an account stated, inasmuch as it shows no balance between the parties; and whether the refusal of the defendant to account, and his allegation that he had never intended to account with plaintiff, did not destroy the character which the court gave to this paper as an account stated. [*314

The third error assigned is, that the court assumed and charged that there was an account stated between the parties. Supposing that the issue had been on the allegation that no account was stated, and that the decision of any paper produced as such, belonged to the court—we contend, that nothing was produced in evidence, which deserved that character, in law or fact; so as to bar the plaintiff of the exception in the statute of limitations concerning merchants' accounts. What is alleged as constituting the account stated, is a demand by the plaintiff on defendant, for a specific sum, which he had incidentally learned from a third person, was the proceeds of his goods; and the account-sales which contained that amount.

We agree, that if accounts between merchants are stated, they are within the statute. 1 Ventr. 89; Ibid. 865; 1 Mod. 269; and cases referred to in Wilkinson on Limit. 30, *et seq.;* Blanshard on Limit. 88, *et seq.* And further, that in accounts between others than merchants, or since *Spring* v. *Gray's Ex'rs*, 6 Pet. 151; 6 T. R. 193; if between merchants, and not concerning the traffic of merchants, to bar the statute, an item must be within six years. We contend, that open accounts between merchants are within the exception; and further, that accounts closed by cessation of dealings, are open accounts; but the pleadings must state accounts to be open. 1 Saund. 127; 6 T. R. 193; 5 Cranch 15; 2 Dall. 254; 2 Yeates 105; 5 Johns. Ch. 526; 19 Ves. 180; Blanshard on Limit. 89.

The accounts must consist of more than one item, and of more *than one transaction; and must, in general, contain mutual credits; [*315 but not as between merchant and factor; for there the course of trade may be, that the factor has only to receive and dispose of the goods, and remit their proceeds. Between a merchant and his factor, there can be no reciprocal demands in buying and selling, such as exist between merchant and merchant. A stated account is a clear statement of accounts, justified by signatures, as exhibiting approbation (2 Young on Invoices 37); none such is pretended. An account-current may become an account stated, by the silence of the party receiving it. 2 Vern. 76; 2 Ves. sen. 239. But as soon as the plaintiff here learned that the defendant had sold his goods, he demanded the proceeds. The defendant refused them, claiming to be entitled to them; he refused to acknowledge the plaintiff as owner, or to account with him; he did not send him account-sales; he made up, three years after this transaction, an account which contained no item of it: and he admits in the pleadings, and on the trial, that he never has stated an account with

him. If an account had never been stated, it is impossible to say, that the plaintiff did not object to it. He claimed an amount which he learned was the proceeds of his goods; the defendant retained it, and the plaintiff objected to his retaining it; he could not do more. The court, therefore, erred, in saying that the account had been unobjected to for ten years; and erred equally in saying, that it was for the plaintiff to make out his replication, that no account had been stated; an allegation, which, if admitted (as it was), was beyond dispute; and if denied, put the burden on the defendant, the plaintiff asserting a negative, the defendant an affirmative. No account stated was or is pretended on behalf of the defendant; none was alleged or produced; nor, under the pleadings, was any admissible in evidence. The fact that the plaintiff had in his possession the account-sales of his goods, did not conclude him from asserting his right to the proceeds; even if it concluded him from disputing the amount. It was, in any sense, no more than accidental knowledge; and not being communicated to him by the defendant, cannot be said to constitute an account stated between the plaintiff and defendant.

Gerhard, for the defendant:—It becomes the duty of the counsel for the defendant in error, not only to maintain that the errors assigned by the plaintiff cannot be sustained, but further to show, if the plaintiff could *316] prove himself *entitled to a reversal of the judgment of the circuit court, that, from a want of jurisdiction, this court ought not to award a *venire de novo*. *Bingham* v. *Cabot*, 3 Dall. 19; *Ketland* v. *The Cassius*, 2 Ibid. 368. The circuit court had no jurisdiction of this cause, because: 1. The circuit courts of the United States have no jurisdiction out of their respective districts; and hence no foreign attachment will lie in a circuit court of the United States. 2. The judiciary act of 1789, in express terms, forbids the exercise of jurisdiction assumed in this case by the circuit court.

I. The circuit courts of the United States have no jurisdiction of actions of foreign attachment. An action of foreign attachment is in direct contravention of the principles of the common law; and in every state in which the action will lie, it depends, for its shape and character and proceedings, upon the statutes of that state. Hereafter, it will be necessary to notice, more particularly, the Pennsylvania action of foreign attachment. It is sufficient at present to say, that in Pennsylvania, it is a mode of commencing actions against a debtor, who is not a resident of the state; nor at the time the attachment issued, within the bounds of the state. Serg. on Attach. 55, 61. Now, certainly, it would seem, until congress shall give the federal courts power to exercise jurisdiction over persons out of the districts to which their jurisdiction are respectively confined by their very constitutions, that no state law like this can be recognised in a federal court; and such is the deliberate opinion of one of the judges of this court. *Picquet* v. *Swan*, 5 Mason 39, 41, 48, 50; 2 Dall. 396. If this position be correct, then the case must be dismissed; for the record shows the nature of the action and of the service of the writ; and the laws of Pennsylvania which are of judicial cognisance, prove that the defendant could not have been within the state, at the time of the service of the process, even if the return of the marshal had been less explicit.

II. The judiciary act of 1789, in express terms, forbids the exercise of jurisdiction assumed in this case by the circuit court. Section 11th points

out the jurisdiction of the circuit courts of the United States, and then proceeds: "But no person shall be arrested in one district, for trial in another, in any civil action, before a circuit or district court. And no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original *process, in any other district than [*317 that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." As it has been decided by this court, that this provision merely confers a personal privilege on a defendant, which he may waive; it will be my effort to show: 1st. That the defendant has not waived his privilege, if he have any: and 2d. That the defendant is entitled to the privilege secured for this provision; that this suit violates that privilege; and that the record shows both the privilege and the violation.

1. The defendant has not waived his privilege, if he have any. To maintain this, it will be necessary to examine into the nature of the Pennsylvania action of foreign attachment; and this will be done as briefly as possible. As has been already stated, it is a mode of commencing actions against a debtor who is not a resident of the state, nor, at the time the attachment issued, within the bounds of the state. Serg. on Attach. 55, 61. The defendant in the attachment cannot put in any defence, unless he appears and gives bail to the action, and submits his person, by so doing, to the jurisdiction of the court. Serg. on Attach. 131. Otherwise, the court will give judgment against him by default, at the third term after the attachment has been issued; and the plaintiff may proceed by *scire facias* against the garnishee, to apply the goods attached to the payment of his, the plaintiff's, claim. Serg. on Attach. 21. But if there be any irregularity in the attachment, as if the defendant be not the subject of an attachment, for instance, if he be within the bounds of the state; the proper mode of taking advantage of such irregularity, is by making a summary application to the court to quash the attachment. By entering the bail to the action, the only terms upon which he is allowed to plead, he waives the irregularity. Serg. on Attach. 139. As soon as the defendant could, he made such an application to the circuit court. The affidavit shows, accurately, the nature of the application. The point was argued; and after considerable hesitation, the court decided, that they would sustain the writ, though the defendant was described in it, &c., as a citizen of Massachusetts. What then could the defendant do? An appearance in the court below, after that decision, was all that remained to him; but as the appearance was an enforced one, there is no case which decides that he cannot now claim the benefit of the privilege, if he was entitled to *it originally; and [*318 surely, there is no principle which would produce that effect. *Harrison* v. *Rowan*, Pet. C. C. 489, is entirely up to this point; and shows that nothing but a *voluntary* appearance waives the privilege of a defendant, not to be sued out of his own district. There, the court go further, and say, that you may appear in order to plead your privilege; but they are far from saying that you must so take advantage of this right: and a careful consideration of the nature of a foreign attachment will show, that whatever might be the case as to a suit in equity, a defendant in a foreign attachment is not, at all events, bound to plead the privilege in question; and it would seem to be a necessary consequence, that after the failure of a sum-

mary application in the court below to quash the writ for this reason, the application may be renewed in the supreme court; since the ground of the application appears upon the record.

2. But is the defendant entitled to the privilege secured by the section of the act in question; does this suit violate that privilege; and does the record show both the privilege and the violation? If the defendant be an inhabitant of the United States, he clearly has the privilege. 1st. Either the word "inhabitant" means any one who is liable to the process of the United States courts; *Picquet* v. *Swan*, 5 Mason 55: or, 2d. It means an inhabitant of one of the United States, *i. e.* a citizen of one of the United States. Now, the word in question must be defined in one of these modes, for otherwise it would embrace cases over which the United States courts have clearly no jurisdiction. *Hepburn* v. *Ellzey*, 2 Cranch 445; *Corporation of New Orleans* v. *Winter*, 1 Wheat. 91; *Picquet* v. *Swan*, 5 Mason 50, 54–5; *Rabaud* v. *De Wolf*, 1 Paine 580.

The first definition is the more natural; for it seems obvious, that every case was intended to be provided for; and this construction is supported by high authority. But if the first be incorrect, then the second definition must be adopted; otherwise, the phrase "inhabitant of the United States," would embrace the case of a citizen of the United States, not a citizen of *one* of the United States: which, as we have seen, is not within the jurisdiction of the federal courts. The literal meaning of the words in question undoubtedly favors this construction of them.

Either definition will, however, be fatal to the plaintiff's case; the first will be clearly so; and I proceed to show, that the second *will be
*319] no less availing to the defendant. It has been repeatedly decided, that where the jurisdiction of the courts of the United States depends upon the character of the parties to the suit, that character must appear upon the record; and that averment is one which the plaintiff must prove. *Catlett* v. *Pacific Ins. Co.*, 1 Paine 594; *Wood* v. *Mann*, 1 Sumn. 581. The character of the parties is here the only foundation of jurisdiction; and the plaintiff averred that the defendant was a citizen of Massachusetts. This appears in the *præcipe* for the writ; in the writ; and in all the subsequent proceedings; and the only foundation of the jurisdiction of the circuit court in this case is, that the defendant was, at the time of the commencement of this action, a citizen of Massachasetts. What is the meaning of the word citizen, in our jurisprudence? Citizenship, when spoken of in the constitution, means nothing more than residence. *Cooper's Lessee* v. *Galbraith*, 3 W. C. C. 546; *Knox* v. *Greenleaf*, 4 Dall. 360. "A citizen who is domiciled in the enemy's country, as to his capacity to sue, is deemed an alien enemy." *Society* v. *Wheeler*, 2 Gallis. 130. The word "inhabitant," in the act, is obviously synonymous with "citizen." 5 Mason 39. See also, *Prentiss* v. *Barton*, 1 Brock. 389. "Inhabitant," is defined by philologists almost by the same words as those employed by the federal court in their definitions of "citizenship," of a state. Crabb's Syn. verb, "to inhabit;" Johnson's Dict.; Webster's Dict., words "inhabit," and "inhabitant." The plaintiff, then, cannot show that the defendant was not an inhabitant of Massachusetts, without contradicting the record; and this he certainly cannot be permitted to do.

These principles only conduct us to the same result as the authorities,

for it has been decided by two of the circuit courts of the United States, "that an action of foreign attachment will not lie in a circuit court against a citizen of the United States." *Hollingsworth* v. *Adams*, 2 Dall. 396; *Picquet* v. *Swan*, 5 Mason 39.

Admitting, however, that the plaintiff is not estopped from showing the defendant's residence to be elsewhere than in Massachusetts, what evidence did he bring to the contrary? Now, will any one contend, that a citizen of the United States loses his domicil, by an absence abroad in the service of his country? If not, then the defendant's domicil, even according to the plaintiff's affidavit, is still in Massachusetts; and if reference is made to the case of *Lazarus* v. **Barnet*, 1 Dall. 153, it will be found, it is believed, that under these circumstances, had the defendant been domiciled in [*320 Pennsylvania, before he left the United States, the action could not have been maintained against him, in a court of the state of Pennsylvania. For residence abroad is only *primâ facie* evidence of domicil. *Johnson* v. *Thirteen Bales, &c.*, 2 Paine 639.

But if the plaintiff can be supposed to have attained his object, and to have shown by the evidence which he adduced for the purpose, that the domicil of the defendant was in Gibraltar, at the time of the institution of this suit; he effectually deprives the courts of the United States of all jurisdiction over the case; since he would then be a citizen of the United States, but not a citizen of *one* of the United States.

To conclude the argument on this point, the record shows that the defendant was, at the time of the commencement of this action, a citizen of Massachusetts; the laws which govern the action of foreign attachment, and make it necessary that the defendant should be absent from the state, are judicially cognisable; and besides, the return of the writ shows that the defendant was not served with the process, in the state of Pennsylvania. The defendant was forced, by the attachment of his funds, and the decision of the court on the summary application, to appear to the action by entering special bail. The error is, therefore, apparent to this court, and the defendant has not waived his privilege. Should the court have any doubt about the nature and grounds of the defendant's application to quash the attachment; he should be permitted to show to this court, that his appearance was an involuntary one. This was the course pursued in *Harrison* v. *Rowan*, Pet. C. C. 489; but had the record been fully certified, there could have been no difficulty upon this subject. If, on the other hand, the defendant was not an inhabitant of Massachusetts, then he was a citizen of the United States, but not a citizen of one of the United States, and the circuit court never had or can have jurisdiction of the cause.

There were two issues tried by the same jury, viz., one an issue on the plea of *non assumpsit;* and the other on the plea of the statute of limitations. Both were found for the defendant, "under the directions of the court."

It is complained, that there was error in the charge of the judge upon the issue of the statute of limitations. If it should be granted, for the sake of argument, that there was, yet how does this affect the *plaintiff? Even if a verdict had been found for him, judgment must have been [*321 given for the defendant, on the finding of the jury on the other issue. There is no error suggested in the judge's directions to the jury, under the gen-

eral issue; for the statute of limitations could not have been given in evidence, under the general issue, and any charge of the court upon the effect of the statute, was, of course, inapplicable to that issue. The error, therefore, if it were material, has become immaterial, by the finding of the jury on the other issue. No court reverses for immaterial errors. If this court should reverse the judgment in this case, what will they do with the verdict on the general issue? Will they grant a *venire de novo*, as to that also, when no error as to it is suggested? It is true, the jury have added a clause to the verdict; from which it appears, that they found for the defendant, "under the direction of the court." But this is no part of the verdict; it is mere surplusage; and it has no legal effect. Nor does it appear, that they allude to the supposed erroneous part of the judge's charge.

The defendant, however, denies that there is any error in the judge's charge. It has been urged, but it cannot be seriously contended, that the judge's charge was in itself erroneous. The only point which can be really pressed is, that the charge was erroneous in reference to the issue as to the statute of limitations, actually under trial; and it is said, that the only point put in issue by the rejoinder was, whether the plaintiff and defendant stood in the relation of merchant and factor; and that the rejoinder admitted, that no account had been settled, by passing that allegation in the replication, and taking issue upon the existence of the relation of merchant and factor.

Is this so? The plaintiff, in his replication, not only states that the action was founded upon accounts between merchant and factor, but also, that no account had been stated or settled between the parties; and the whole of this matter was necessary to constitute a good reply to the defendant's plea. 5 Cranch 15; *Spring* v. *Gray*, 6 Pet. 151; *Stiles* v. *Donaldson*, 2 Dall. 264. If, then, that was a single proposition of defence, when we denied that "those sums of money became payable in trade had between merchant and merchant and factor, &c., in manner and form, &c.," as the replication alleged, we denied the whole proposition of defence; and the question whether an account had been settled, immediately arose, and was passed upon by the jury. If this was not the case, the issue *upon
*322] the statute of limitations was an immaterial one. If the defendant was the factor of the plaintiff, then the account rendered to Pettit is an account stated. Both admit the foot of that account to be the amount in controversy.

Gilpin, for the plaintiff:—The facts involved are few, and not disputed. In September 1824, Henry Toland, a citizen of Pensylvania, shipped certain tobacco and teas, in the William Penn, bound to Gibraltar. They were consigned to Pettit, the supercargo. Part were sold there by him, and $1000 of the proceeds remitted to Toland. When Pettit left Gibraltar, in December, he placed the remainder of these goods, with those of other persons, in the hands of Horatio Sprague, a citizen of Massachusetts, then and still resident in Gibraltar; with instructions to sell and account therefor to Toland. He corresponded with the latter accordingly, up to the following June; when, on a settlement made between Pettit and Sprague, at Gibraltar, of their own affairs, it appeared, that the former was largely indebted to the latter; who, thereupon, passed the proceeds of the goods,

amounting to $1579.11, to Pettit's credit in their account, and so wrote to Toland. No account was furnished to the latter; but in the month of September 1825, he saw in the possession of Pettit, a general account of sales from Sprague, in which this item was embraced, and he thereupon demanded payment of it from Sprague. This was refused; and though the commercial dealings and accounts between them continued for several years, pay- of this sum never was obtained. In August 1834, finding some property of Sprague in Pennsylvania, the plaintiff, Toland, commenced a suit, by a foreign attachment, in the circuit court of the United States for that district.

It is now objected, that the court had no jurisdiction of such suit; and this objection amounts to a denial of the right of proceeding in the circuit courts of the United States, by "foreign attachment." If this be so, it is scarcely possible, that on a point which must have so often arisen, we can be without an express judicial decision to that effect. Yet none such has been produced. Two cases are relied on; but neither of them turns upon this point, or resembles, in its circumstances, that now before the court. In the case of *Picquet* v. *Swan*, 5 Mason 38, the defendant was described not as a citizen of *a different state from the plaintiff, but as "a citizen of the United States;" a defect which Judge STORY declared to [*323 be fatal. Again, the service of the summons was clearly "defective and nugatory." In the case of *Richmond* v. *Dreyfous*, 1 Sumn. 131, it appeared, that the defendant was a resident and inhabitant of another state, at the time the suit was brought; and, of course, exempted by the express provision of the judiciary act. But while no decision can be produced against this mode of proceeding, in a similar case; there are several instances in which it has been adopted and allowed. *Fisher* v. *Consequa*, 2 W. C. C. 382; *Craighle* v. *Notnagle*, Pet. C. C. 255; *Pollard* v. *Dwight*, 4 Cranch 421.

The law would seem to be very clear. By the act of 29th September 1789, § 2, a plaintiff in the circuit court is entitled to "all such forms of writs and modes of process," as are "used or allowed in each state, respectively;" and it is not denied, that this form of writ, and mode of process, is used and allowed in Pennsylvania. We admit, that this law is controlled by the act of 24th September 1789, which describes the persons who may, and who may not be sued. By that law, the suit must be "between a citizen of the state where the suit is brought and a citizen of another state:" a fact which appears in this case, in all the pleadings. There is a proviso, however, that "no civil suit can be brought against an inhabitant of the United States, in any other district than that whereof he is an inhabitant." It is not denied, that if the defendant, Sprague, was an inhabitant of any other state, this proceeding would not lie; but it is proved, he is not: it is admitted, that he has long been an inhabitant of Gibraltar. It is attemped to blend together citizenship and inhabitancy. The act of congress did not mean this; it grants a personal privilege to the inhabitants of every state, whether they be citizens or aliens; it gives to every person actually resident in any state, the privilege of being sued there, and exempts him from being dragged away to a distant tribunal; the defendant is no such resident, and consequently, the law did not mean to give him any such privilege.

But even had he been entitled to that privilege when the suit was

brought, it is now too late to avail himself of it. He has pleaded in bar to the action, which is a waiver of his personal privilege. Had he pleaded in abatement, the point would have come up for the judgment of the court. By neglecting to do so, he has waived it. *Harrison* v. *Rowan*, Pet. C. C. 491; *Pollard* v. *Dwight*, 4 Cranch 421; *Logan* v. *Patrick*, 5 Ibid. 288; *Picquet* v. *Swan*, 5 Mason *43. The motion to quash was a summary proceeding, on which error will not lie. If the defendant intended to avail himself of an alleged error of the court in that decision, he should have then permitted judgment to go by default; or have pleaded in abatement, so that there might have been a judgment on the point. He has pleaded over to the action, and it is now too late to avail himself of the error, if it were one.

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But suppose, it was error in the circuit court to refuse this privilege, even on a summary motion: still, by the record now before this court, it does not appear that they did so. The record merely sets forth a general "motion to quash the attachment;" and as general a "refusal" by the court: the grounds either of the one or the other do not appear.

Passing, then, this preliminary point of the jurisdiction of the circuit court, we come to the charge of the court, in which the plaintiff contends there is manifest error. It is necessary to examine the pleadings carefully. This is an action of *assumpsit*. The defendant pleads first, *non assumpsit;* second, the statute of limitations. The plaintiff joins issue on the first; and replies to the second, that he is not barred by the statute of limitations, because "the sum claimed became due in trade between them as merchants, and merchant and factor, and that no account was ever stated or settled between them." The defendant rejoins only, that "the sum claimed did not become due in trade between them as merchants, and merchant and factor." The plaintiff joins issue. Here then are two issues, both tendered by the defendant; and they are first, *non assumpsit;* second, were the dealings between the parties those of merchants? No other points are left open by the pleadings. The whole intention of pleading is, to ascertain exactly the point in controversy; the issue tendered is the notice of this point given by one party to the other. Accordingly, on the trial (as the receipt of the money was admitted, and the *assumpsit* thus proved), the whole evidence and argument were confined to the point, whether or not "the dealings between the parties were those of merchants, and merchant and factor." When the court came to charge the jury, they excluded, expressly, from their consideration, all the evidence as to the facts involved in this point, and all the arguments upon it; and they instructed them, that the case was to be decided upon another point; namely, that where there was a settled and stated account for more than six years, it barred the plaintiff's claim; that the account of 4th *July 1825, from Sprague to Pettit, was such a one; and that the jury must so find, as the question was one of law, not of fact. The verdict was so found accordingly, "under the direction of the court." To this charge, we have three exceptions:

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I. The court charged on the issue, "whether or not there was a settled and stated account between these parties;" and in so doing, they erred. 1. Because the parties themselves never made such an issue in their own pleadings. The plaintiff in his replication had expressly rendered that point to the defendant, but he had not accepted it. 2. Not only was that point not

made by the pleadings, but it was excluded by them; for if there was an account settled and stated, it showed a balance due to the plaintiff for more than six years, yet the defendant denies any such balance, at any time. Again, it is excluded, because it was traversable matter, presented, *totidem verbis*, in the replication; and it is a settled rule of pleading, that "every material fact alleged must be traversed" (*Larned* v. *Bruce*, 6 Mass. 57); and that "where traversable matter is not traversed, it is confessed." *Nicholson* v. *Simpson*, 1 Str. 297. The allegation made by the plaintiff in his replication, that there was no account stated, not being traversed, was thus confessed; and therefore, excluded from the consideration of the jury, or the court. 3. Nor was the case either argued or tried upon this point. It was therefore, error in the court to charge on it. They had no right to put to the jury that which was concluded by the pleadings; as well might the court on a plea of payment, in an action of debt on a bond, instruct the jury to find that it was, or was not, the deed of the defendant.

II. But suppose, the question, whether there was a settled account, be not concluded by the pleadings; be still open to the jury; yet this was a matter of fact. Various considerations are involved in it; it is not "a construction of written papers;" the very plea and issue show it was for a jury: there was a complicated account between Sprague and Pettit, a third person; the extent to which Toland, the plaintiff, was connected with each of them, was an essential element. The court, in their charge, took entirely from the jury all consideration of these matters, and decided the point as entirely one of law. In this there was error.

III. To come, however, to the main inquiry. We contend, that there never was, in fact, an account stated and settled, so as to deprive *the plaintiff of the benefit of that exception in the statute of limitations which exists in favor of merchants. If we establish this, as the [*326 court has charged, there is such a stated and settled account, we establish a manifest error. According to the evidence in the case, the defendant, Sprague, was the factor of Toland, the plaintiff; and corresponded with him as such, from December 1824, to July 1825. He was also, during the same period, engaged in trade with Pettit. In the latter month, he made up an account-sales between himself and Pettit, and send it, not to the plaintiff, but to Pettit; in whose hands the plaintiff saw it, and found it embraced some of his property; and this he demanded of him. The dealings between the plaintiff and defendant continued open for several years: Sprague always explicitly refused to state or settle an account between himself and Toland, for any item in the account-sales rendered to Pettit, and denied that the former had any thing to do with it. Yet, on these facts, it is contended, that there was a stated and settled account between Toland and Sprague. What is a "stated account?" Lord HARDWICKE describes it. It is an account-current, sent by one merchant to another, in which a balance is due from one to the other. *Tickel* v. *Short*, 2 Ves. 239. If the receiver holds it for a certain time, without objection, it becomes a stated account. It must be an account, that is, a settlement of their transactions by the parties; it must be between themselves; it must preclude both parties. But how is this account between Pettit and Sprague, a settlement between the latter and Toland? Would Sprague be precluded from any claim against Toland, because he had omitted to state it in such an account with a third person?

It is no settlement, no statement of an account; and consequently, no bar.

In addition to these exceptions to the charge of the court, it remains to make a single remark on a point presented by the defendant, as a reason why the writ of error should be dismissed; that "there were two pleas pleaded, the one being the general issue, and no averment in the record, that in this verdict and judgment on this plea, these was error." In reply, the judgment is entered on the verdict, and that is expressly stated to be under the direction of the court, whose charge was confined to the question of the statute of limitations. But in truth, this is not material; for it is sufficient to show manifest error, on any point, in the charge of the court.

*327] *Barbour, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the United States for the district of Pennsylvania. The suit was commenced by the plaintiff in error, against the defendant in error, by a process known in Pennsylvania by the name of a foreign attachment; by which, according to the laws of that state, a debtor who is not an inhabitant of the commonwealth, is liable to be attached by his property found therein, to appear and answer a suit brought against him by a creditor. It appears upon the record, that the plaintiff is a citizen of Pennsylvania; and the defendant, a citizen of Massachusetts, but domiciled, at the time of the institution of the suit, and for some years before, without the limits of the United States, to wit, at Gibraltar; and when the attachment was levied upon his property, not being found within the district of Pennsylvania. Upon the return of the attachment, executed on certain garnishees holding property of, or being indebted to, the defendant, he, by his attorney, obtained a rule to show cause why the attachment should not be quashed, which rule was afterwards discharged by the court; after which, the defendant appeared and pleaded. Issues were made up between the parties, on which they went to trial, when a verdict and judgment were rendered in favor of the defendant. At the trial, a bill of exceptions was taken by the plaintiff, stating the evidence at large, and the charge given by the court to the jury; which will hereafter be particularly noticed, when we come to consider the merits of the case. But before we do so, there are some preliminary questions arising in the case, which it is proper for us to dispose of.

And the first is, whether the process of foreign attachment can be properly used by the circuit courts of the United States, in cases where the defendant is domiciled abroad, and not found within the district in which the process issues, so that it can be served upon him? The answer to this question must be found in the construction of the 11th section of the judiciary act of 1789, as influenced by the true principles of interpretation; and by the course of legislation on the subject. That section, so far as relates to this question, gives to the circuit courts original cognisance, concurrent with the courts of the several states of all suits of a civil nature, at common

*328] law or in equity, where *the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and an alien is a party; or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. It then provides, that no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district

court; and moreover, that no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he will be found at the time of serving the writ. As it respects persons who are inhabitants, or who are found in a particular district, the language is too explicit to admit of doubt. The difficulty is, in giving a construction to the section in relation to those who are *not* inhabitant, and *not* found in the district.

This question was elaborately argued by the circuit court of Massachusetts, in the case of *Picquet* v. *Swan*, reported in 5 Mason 35. Referring to the reasoning in that case, generally, as having great force, we shall content ourselves with stating the substance of it, in a condensed form, in which we concur. Although the process acts of 1789 and 1792 have adopted the forms of writs and modes of process in the several states, they can have no effect, where they contravene the legislation of congress. The state laws can confer no authority on this court, in the exercise of its jurisdiction, by the use of state process, to reach either persons or property, which it could not reach within the meaning of the law creating it. The judiciary act has divided the United States into judicial districts; within these districts, a circuit court is required to be holden; the circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court, to have run into any state of the Union; it has not done so. It has not, in terms, authorized any original civil process to run into any other district; with the single exception of *subpœnas* for witnesses, within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same state; and the other, in favor of the United States, in any part of *the United States. We think, that the opinion of the legislature is thus manifested to be, that [*329 the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor.

If such be the inference from the course of legislation, the same interpretation is alike sustained by considerations of reason and justice. Nothing can be more unjust, than that a person should have his rights passed upon, and finally decided by a tribunal, without some process being served upon him, by which he will have notice, which will enable him to appear and defend himself. This principle is strongly laid down in *Buchanan* v. *Rucker*, 9 East 192. Now, it is not even contended, that the circuit courts could proceed to judgment against a person who was domiciled without the United States, and not found within the judicial district, so as to be served with process, where the party had *no* property within such district. We would ask what difference there is, in reason, between the cases in which he *has*, and has *not* such property? In the one case, as in the other, the court renders judgment against a person, who has no notice of the proceeding. In the one case, as in the other, they are acting on the rights of a person who is beyond the limits of their jurisdiction, and upon whom they have no

power to cause process to be personally served. If there be such a difference, we are unable to perceive it.

In examining the two restraining clauses of the 11th section, we find, that the process of *capias* is, in terms, limited to the district in which it is issued. Then follows the clause which declares, that no civil suit shall be brought before either of the said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. We think that the true construction of this clause is, that it did not mean to distinguish between those who are inhabitants of, or found within the district, and persons domiciled abroad, so as to protect the first, and leave the others not within the protection; but that even in regard to those who were within the United States, they should not be liable to the process of the circuit courts, unless in one or the other predicament stated in the clause; and that as to all those who were not within the United States, it was not in the contemplation of congress, that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a *foreign jurisdiction, could not be served upon them; and therefore, there was no provision whatsoever made in relation to them.

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If, indeed, it be assumed, that congress acted under the idea that the process of the circuit courts could reach persons in a foreign jurisdiction, then the restrictions might be construed as operating only in favor of the inhabitants of the United States, in contradistinction to those who were not inhabitants; but, upon the principle which we have stated, that congress had not those in contemplation at all, who were in a foreign jurisdiction, it is easy to perceive, why the restriction in regard to the process was confined to inhabitants of the United States. Plainly, because it would not have been necessary or proper, to apply the restriction to those whom the legislature did not contemplate, as being within the reach of the process of the courts, either with or without restrictions.

With these views, we have arrived at the same conclusions as the circuit court of Massachusetts, as announced in the following propositions, viz: 1st. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2d. That independently of positive legislation, the process can only be served upon persons within the same districts. 3d. That the acts of congress adopting the state process, adopt the form and modes of service, only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4th. That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court *in personam;* that is, where they are inhabitants, or found within the United States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here: and we add, that even in case of a person being amenable to process *in personam*, an attachment against his property cannot be issued against him; except as part of, or together with, process to be served upon his person.

The next inquiry is, whether the process of attachment having issued improperly, there has anything been done which has cured the error? And we think that there is enough apparent on the record, to produce that effect.

It appears, that the party appeared and pleaded to issue. Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties, *and the matter in dispute; the objection was, that the party [*331
defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam*. Now, this was a personal privilege or exemption, which it was competent for the party to waive. The cases of *Pollard* v. *Dwight*, 4 Cranch 421, and *Barry* v. *Foyles*, 1 Pet. 311, are decisive to show, that after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves, that exemption from liability to process, and that in case of foreign attachment, too, is a personal privilege, which may be waived; and that appearing and pleading will produce that waiver.

It has, however, been contended, that although this is true, as a general proposition, yet the party can avail himself of the objection to the process in this case, because it appears from the record, that a rule was obtained by him to quash the attachment, which rule was afterwards discharged; thus showing, that the party sought to avail himself of the objection below, which the court refused. In the first place, it does not appear upon the record, what was the ground of the rule; but if it did, we could not look into it here, unless the party had placed the objection upon the record, in a regular plea; upon which, had the court given judgment against him, that judgment would have been examinable here. But in the form in which it was presented in the court below, we cannot act upon it in a court of error. The judiciary act authorizes this court to issue writs of error to bring up a final judgment or decree in a civil action, or suit in equity, &c. The decision of the court upon a rule or motion, is not of that character. This point, which is clear upon the words of the law, has been often adjudged in this court; without going further, it will be sufficient to refer to 6 Pet. 648; 9 Ibid. 4. In the first of these cases, the question is elaborately argued by the court, with a review of authorities; and they come to this conclusion, that they consider all motions of this sort (that is) to quash executions, as addressed to the sound discretion of the court; and as a summary relief, which the court is not compellable to allow. That the refusal to quash is not, in the sense of the common law, a judgment; much less is it a final judgment. It is a mere interlocutory order. Even at common law, error only lies from a final judgment; and by the express provisions of the judiciary *act, [*332
a writ of error lies to this court only in cases of final judgments.

Having now gotten rid of these preliminary questions, we come, in the order of argument, to the merits of the case. To understand these, it will be necessary to look into the pleadings, the evidence, and charge of the court, as embodied in the exceptions. The declaration is in *assumpsit*, and originally contained three counts, viz.: the first, a count charging the delivery of certain goods to the defendant, upon a promise to account and pay over the proceeds, or sale thereof, by the defendant, and a breach of promise, in not accounting, or paying the proceeds of the sale: 2d. A count in *indebitatus assumpsit:* and 3d. A count upon an account stated. A rule having

been granted to amend the declaration, by striking out this last count, and that rule having been made absolute, we shall consider the declaration as containing only the first two counts. To this declaration, the defendant pleaded the general issue, which was joined by the plaintiff, and also the act of limitations; to this second plea, the plaintiff replied, relying on the exception in the statute in favor of such accounts as concern the trade of merchandise between merchant and merchant, and their factors or servants; averring that the money in the several promises in the declaration became due and payable on trade had between the plaintiff and defendant, as merchant, and merchant and factor, and wholly concerned the trade of merchandise between the plaintiff as a merchant, and the defendant as a merchant and factor of the plaintiff; and averring also, that no account whatever of the said money, goods and merchandises, in the declaration mentioned, or any part thereof, was ever stated or settled between them. The defendant rejoined, that he was not the factor of the plaintiff; and that the money in the several promises in the declaration mentioned, did not become due and payable in trade had between the plaintiff and defendant as merchant, and merchant and factor; and on this, issue was joined. On the trial of these issues, there were sundry letters between the parties, and accounts, given in evidence, which are set forth at large in a bill of exceptions, in relation to which the court gave a charge to the jury: the jury having found a verdict for the defendant, and the court having rendered a judgment in his favor, the case is brought by the plaintiffs into this court, by writ of error. And the question is, whether there is any error in the charge of the court, as applied to the facts of the case stated in the exception. The *333] court, after going *at large into the facts of the case, and the principles of law applying to it, concluded with this instruction to the jury: That there was no evidence in the cause, which could justify them in finding that the account in evidence, was such a mutual, open one, as could bring the case within the exception of the act of limitations.

In deciding upon the correctness of this instruction, it is necessary to inquire, what is the principle of law by which to test the question, whether a case does, or does not, come within the exception of the statute, in favor of accounts between merchant and merchant, their factors or servants. No principle is better settled, than, that to bring a case within the exception, it must be an account; and that, an account open or current. See 2 Wms. Saund. 127, d, e, note 7. In 2 Johns. 200, the court says, that the exception must be confined to actions on open or current accounts; that it must be a direct concern of trade; that liquidated demands, or bills and notes which are only traced up to the trade or merchandise, are too remote to come within this description. But the case of *Spring* v. *Gray's Executors*, in this court (6 Pet. 151), takes so full and accurate a review of the doctrine and cases, as to render it unnecessary to refer to other authorities. It distinctly asserts the principle, that the account, to come within the exception, must be open or current. This construction, so well settled on authority, grows out of the very purpose for which the exception was enacted. That purpose was, to prevent the injustice and injury which would result to merchants having trade with each other, or dealing with factors, and living at a distance, if the act of limitations were to run, where their accounts were open and unsettled; where, therefore, the balance was unascertained, and

where, too, the state of the accounts might be constantly fluctuating, by continuing dealings between the parties.

But when the account is stated between the parties, or when anything shall have been done by them, which, by their implied admission, is equivalent to a settlement, it has then become an ascertained debt. In the language of the court of appeals of Virginia (4 Leigh 249), "all intricacy of account, or doubt as to which side the balance may fall, is at an end;" and thus the case is neither within the letter nor the spirit of the exception. In short, when there is a settled account, that becomes the cause of action, and not the original account, although it grew out of an account between merchant and merchant, their factors or servants.

Let us now inquire, how far this principle applies to the facts of *this case. It appears by the bill of exceptions, that the facts are these: In the year 1824, the plaintiff consigned a quantity of mer- [*334 chandise, by the ship William Penn, bound to Gibraltar, to a certain Charles Pettit, accompanied with instructions as to the disposition of it. Pettit, after arriving at Gibraltar, and remaining there a short time, placed all the merchandise belonging to the plaintiff, which remained unsold, in the hands of the defendant, to be disposed of by him, for plaintiff's account. The plaintiff produced on the trial, an account of the sales of the aforesaid merchandise, dated June 30th, 1825, signed by the defendant, as having been made by him, amouting in net proceeds to $2579.13, and showing that balance. In September 1825, the plaintiff wrote to the defendant, requesting him to remit to him the net proceeds of this merchandise, amounting to $2579.13; after deducting therefrom a bill of exchange of $1000, which had been drawn by defendant in favor of Charles Pettit, on a house in New York. Pettit being indebted to the defendant, as alleged by him, in a large sum of money, for advances and otherwise, the defendant refused to pay the plaintiff the amount of the sales of the merchandise, and denied his liability to account to him therefor. In addition to the demand before stated, by plaintiff on the defendant, for the balance of the account of sales, by letter, on the trial of the cause, the counsel for the plaintiff, in opening the case, claimed the balance of an account between Sprague, the defendant, and Charles Pettit; being the precise amount of the balance of the account of sales, after deducting the bill of exchange for $1000. It appears, that the plaintiff was in possession of the account of sales, as early as September 1825.

Upon this state of facts, appearing in the record, the question is, whether the cause of action in this case is an open or current account between the plaintiff and defendant, as merchant and factor, concerning merchandise; or whether it is an ascertained balance, a liquidated sum, which, although it grew out of a trade of merchandise, is, in legal effect, under the circumstances, a stated account? We think it is the latter. In the language of the court who gave the charge, we think that *"the claim is for a [*335 precise balance, which was demanded by the plaintiff from the defendant in 1825." From the nature of the account, and the conduct of the parties, there was, from the time the account of sales was received by the plaintiff, showing the balance, and demanded by the plaintiff of the defendant, no unsettled open account between them, as merchant and merchant, or merchant and factor. We agree in opinion with the circuit court, that there

was a matter of controversy brought to a single point between them; that is, which of them had, by law, a right to a sum of money, ascertained, by consent, to amount to $1579. That the nature of the account is not changed by there being a controversy as to a balance stated, which the defendant does not ask to diminish, or the plaintiff to increase; and as neither party asks to open the account, and both admit the same balance, there can be no pretence for saying, that it is still open. As the circuit court say, the question between them is not about the account, or any item in it; but as to the right of the defendant to retain the admitted balance, to repay the advances made to Pettit. We agree with the court, that the mere rendering an account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him; then it becomes a stated account. Nor do we think it at all important, that the account was not made out as between the plaintiff and defendant; the plaintiff having received it, having made no complaint as to the items or the balance, but on the contrary having claimed that balance, thereby adopted it; and by his own act treated it as a stated account. We think, therefore, that the act of limitations began to run from the year 1825, when that demand was made; and consequently, that the instruction of the court was correct, in saying that it was not within the exception.

It has, however, been argued, that whatever might be the conclusion of the court, as resulting from the evidence, that the defendant had admitted upon the record, that the account was an open one. It is said, that the plaintiff having averred in his replication, that there was no account stated or settled between him and the defendant, and the defendant not having traversed that averment in his rejoinder, the matter contained in that averment is admitted. It is a rule in pleading, that where in the pleading of one party, there is a material averment, which is traversable, but which is not traversed by the other party, it is admitted. We think that the rule does not apply to this *case, because the negative averment in the replication that no account had been stated between the parties, was not a necessary part of the plaintiff's replication, to bring him within the exception of the statute in relation to merchants' accounts. Inasmuch, then, as the replication, without that averment, would be sufficient; we do not consider it as one of those material averments, the omission to traverse which, is admission of its truth, within the rule before stated.

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But in another aspect of this case, the statute of limitations would apply to, and bar the plaintiff's claim; if the account of sales were regarded as having no operation in the case. The plaintiff, standing in the relation which he did to the defendant, as it respects this merchandise, had a right to call upon him to account; he did make that demand, and the defendant refused to render one, holding himself liable to account to Pettit only. From the moment of that demand and refusal, the statute of limitations began to run. See 1 Taunt. 572.

It was argued, that the question whether there was a stated account or not, was a question of fact for the jury; and that, therefore, the court erred in taking that question from them, and telling them that this was a stated account. The answer is, that there was no dispute aboute the facts; and that the plaintiff claimed the balance of the account as being the pre-

cise sum due to him. It was, therefore, competent to the court to instruct the jury that it was a stated account.

Upon the whole, we think there is no error in the judgment; it is therefore affirmed, with costs.

TANEY, Ch. J.—I concur with the majority of the court in affirming the judgment of the circuit court. But I do not assent to that part of the opinion which declares, that the circuit courts of the United States have not the power to issue the process of attachment against the property of a debtor, who is not an inhabitant of the United States. It does not appear by the record, that this point was raised in the court below; and I understand from the learned judge who presided at the trial, that it was not made.

The decisions on this question have not been uniform at the circuits. In several districts where this process had been authorized by the laws of the states, the circuit courts of the United States adopted it in practice; and appeared to have considered the act of congress *of 1789, as having authorized its adoption. The different opinions entertained in [*337 different circuits, show that upon this point the construction of the act of 1789 is not free from difficulty; and as the legality of this process has been recognised in some of the circuits, for many years, it is probable, that condemnations and sales have taken place under such attachments, and that property is now held by *bonâ fide* purchasers, who bought, and paid their money, in the confidence naturally inspired by the judgment of the court. If the case before us required the decision of this question, it would be our duty to meet it and decide it. But the point is not necessarily involved in the decision of this case; and I am, therefore, unwilling to express an opinion upon it.

The attachment, in the case before us, was dissolved by the appearance of the defendant, and no final judgment was given upon it in the court below. When the defendant appeared and pleaded in bar to the declaration filed by the plaintiff, the controversy became an ordinary suit between plaintiff and defendant; the proceedings on the attachment were at an end, and could in no degree influence the future progress and decision of the action. And this court, in revising the judgment given by the circuit court in such an action, cannot look back to the proceedings in the attachment, on which no judgment was given; nor can the refusal of the circuit court to quash the attachment, on the motion made by the defendant, be assigned as error in this court. The validity of that process, therefore, need not be drawn into question in the judgment of this court, on the case presented here for decision. For whether the attachment was legal or illegal, the judgment of the circuit court, as the case comes before us, must be affirmed. And as the question is an important one, and may affect the rights of individuals who are not before the court, and as the case under consideration does not require us to decide it; I think it advisable to abstain from expressing an opinion upon it; and do not assent to that part of the opinion of the court which declares that the process in question is not authorized by the acts of congress.

BALDWIN, Justice, agreed with the chief justice in the opinion delivered by him; if it was necessary, he would go further, as to the authority of the courts of the United States to issue foreign attachments.

WAYNE, Justice, agreed with the chief justice in opinion. He *thought the circuit courts of the United States had authority to issue foreign attachments. The decision on that point is not necessary to the decision of this case.

CATRON, Justice, had not formed any opinion on the question of the right of the circuit courts to issue foreign attachments. He thought that question did not come before the court in this case; and it was not necessary to examine or decide it.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*339] *_Ex parte_ BENJAMIN STORY: In the matter of LOUISE LIVINGSTON, Executrix of EDWARD LIVINGSTON, deceased, _v._ BENJAMIN STORY.

Chancery practice.—Mandamus.—Effect of mandate.

A bill of exceptions is altogether unknown in chancery practice; nor is a court of chancery bound to inscribe in an order-book, upon the application of one of the parties, an order which it may pass in a case before it.

The court refused to award a *mandamus* to the district judge of the district of Louisiana, commanding him to sign a bill of exceptions tendered to him, and to command him to have inscribed, by the clerk of the court, on the order-book of the court, an order passed by him, in a case which was before him under a mandate from the supreme court of the United States, requiring him to do, and to have done, certain matters to carry into effect the decree of the supreme court, in a case which had been brought before the court by appeal from the district of Louisiana.

At the time when a decree was made in the district court of Louisiana, in a case before it, the complainant was dead; the executrix was afterwards admitted, by the district court, to become a party to the suit, and prosecuted an appeal to the supreme court, where the decree of the district court was reversed on the merits; and the case was sent back to the district court on a mandate, requiring the decree of the supreme court to be carried into effect. The decease of the plaintiff, before the decree, and his having left other heirs besides the executrix, was offered in the form of a supplemental answer to the original bill, to the district court, when acting under the mandate of the supreme court, to show error in the proceedings of that court, with a view to bring the case again before the supreme court, in order to have a re-examination and a reversal of the decree of the court; the district court refused to permit the evidence of the matters alleged to be entered on the records of the court, or to sign a bill of exceptions, stating that the same had been offered. In the case of Skillern's Executors _v._ May's Executors, 6 Cranch 267, it was said, "as it appeared that the merits of the case had been finally decided in this court, and that its mandate required only the execution of the decree, the circuit court was bound to carry that decree into execution, although the jurisdiction of the court was not alleged in the pleadings;" in the case now before the court, the merits of the controversy were finally decided by this court, and its mandate to the district court required only the execution of the decree. On the authority of this case, the refusal to allow the defendant to file a supplemental answer and plea, was sustained.

THE case of Louise Livingston, executrix of Edward Livingston, deceased, was before this court, at the January term 1837, on the appeal of Mrs. Livingston, as administratrix, against Benjamin Story, from the district court of the United States for the eastern district of Louisiana. (11 Pet. 351.) *The decree of the district court of Louisiana was reversed, and the case was sent back to that court on a special mandate from this court.

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Ex parte Story.

Crittenden, for Benjamin Story, now presented to this court a petition, on behalf of Mr. Story, stating: That there was pending against him, in the court of the United States of the ninth circuit, and eastern district of the state of Louisiana, a certain suit in chancery, in the name of Louise Livingston, which suit was originally instituted in the name of Edward Livingston. "That during the present term of the court, your petitioner moved the court to abate or dismiss said cause, upon the ground that Edward Livingston had departed this life, before the rendition of the decree dismissing *this* bill. That upon the hearing of said motion, your petitioner introduced a witness for the purpose of proving the time of the death of Edward Livingston, whose evidence was rejected by the court; to which opinion, an exception was taken, and a bill of exceptions prepared, which stated truly the facts, a copy of which accompanies this petition. Upon its presentation, the judge remarked, that he would sign no bill of exceptions, unless he was convinced he was bound to sign one. Upon being subsequently importuned upon the subject, he stated, if he signed a bill of exceptions, he must give the reasons at length for his opinion. He has been again and again importuned, and unsuccessfully, on the subject. That on this day your petitioner's counsel presented to the court the annexed answer, &c., and desired that it might be placed upon the files in the cause; but the court refused permission to file the same. Thereupon, the annexed bill of exceptions was tendered to the judge, which bill truly stated the facts; but the judge refused to sign the same, or make it a part of the record. The court was then moved to direct the clerk of the court to state the facts upon the order-book; but the court refused to suffer any notice to be taken of this matter, as a part of the proceedings in the court; stating, at the same time, that he considered a *mandamus* to be the true remedy; and alleging no other reason for not signing the bill of exceptions, or suffering notice to be taken of the presentation of the answer on the record. Thus far your petitioner is denied the opportunity of having the *said decisions of the court revised, or of having the records of the court to speak the whole truth. [*341 Your petitioner annexes a full transcript of the proceedings in said case, since it was remanded. Forasmuch as your petitioner is without other remedy, he prays your honorable body to award to him a writ of *mandamus* in nature of a writ of *procedendo*, to compel the judge, the Hon. P. K. Lawrence, to sign said exceptions; and to permit the said record to speak the truth. Your petitioner prays for whatever else in the premises that the circumstances of the case will require."

The facts stated in the petition were verified by an affidavit, by Mr. Chinn, the counsel for the petitioner in the circuit court.

The following is a copy of one of the bills of exception referred to in the foregoing petition:

Livingston } On motion to strike the cause from the docket.
v. }
Story. }

Be it remembered, that on the trial of this motion, the defendant, Story, introduced Henry Carlton as a witness, and offered to prove by him, that Edward Livingston, the former complainant herein, departed this life on the ——— day of ———, and before the trial and decree in this court, at

the spriug term 1836 ; and also, that Edward Livingston left living a daughter and heir, at the time of his death, who is still living. To the admissibility of all of said evidence, the complainants counsel objected, and the court sustained the objection ; and would not permit said witness to be examined, or the testimony of the foregoing facts, or either of them, to be inquired into. To which opinion of the court, the defendant excepted, and prays that his exception may be signed, sealed and enrolled, which is done.

The motion was opposed by *Key*, of counsel for Mrs. Livingston.

Taney, Ch. J., delivered the opinion of the court:—In this case, a *mandamus* has been moved for, on behalf of Benjamin Story, to the circuit court for the ninth circuit of the eastern district of Louisiana. The facts in the case are as follows :

*342] Edward Livingston, in his *lifetime, filed a bill on the equity side of the district court for the eastern district of Louisiana, against Benjamin Story ; and at the hearing of the cause, the court decided against the complainant, and dismissed the bill. This decree was passed June 3d, 1836. On the 1st of October 1836, Louise Livingston filed a petition in the district court, stating that Edward Livingston had died after the suit was decided, and had by his will appointed her sole executrix ; and praying leave to make herself a party, in order to appeal to this court. A copy of the will of Edward Livingston was filed with this petition, by which it appeared, that she was the sole executrix. Louise Livingston was accordingly permitted to become a party, and by her solicitor appeared in the district court as complainant, in the character of executrix, and appealed to this court ; where the cause was heard, at January term 1837, and the decree of the district court reversed, and the case sent back, with a mandate from this court to the court below, directing the further proceedings to be had in that court.

It appears by the petition for the *mandamus* (which is verified by affidavit), and by the copy of the record from the court below which accompanies it, that the mandate from this court was filed in the district court, March 2d, 1837 ; and proceedings were accordingly had, under the orders of the district court, to carry into execution the directions contained in the mandate. Afterwards, the case having been transferred to the circuit court, under the act of congress creating additional circuits, the defendant, on the 20th of November 1837, obtained a rule on the complainant to show cause why the bill should not be dismissed, or the suit abated, upon the ground, that Edward Livingston, the complainant in the original bill, died before the hearing and decree in the district court in 1836 ; and also, because the suit had not been regularly revived by his executrix, the present complainant, and could not be revived, inasmuch as she claimed as devisee. On the 18th of December 1837, the rule above mentioned was discharged ; and the testimony offered to prove the facts alleged as the foundation of the rule rejected by the court. The defendant, on the day last mentioned, further moved, that he be permitted to give evidence that Edward Livingston had left other heirs besides Mrs. Louise Livingston, which motion was also overruled by the court. The defendant thereupon tendered a bill of exceptions to these

opinions, but the court refused to sign it. The defendant afterwards prayed leave to file "a supplemental answer and plea," in *which he averred that Edward Livingston, the original complainant, died on the 23d of [*343 May 1836, which was some days before the decree of the district court dismissing his bill; and also averred, thet he left a daughter, who was still living, and had an interest in the subject-matter in controversy; and pleaded the death of said Edward Livingston in abatement of the proceedings; and further insisted, that the suit had never been revived by Louise Livingston, who appears as complainant; that the daughter of Edward Livingston was a necessary party; and that the court could not entertain jurisdiction, because she was not a party. The court refused to receive this answer, or to permit it to be filed. The defendant thereupon tendered another bill of exceptions, which the court refused to sign. The defendant then moved the court to direct the clerk to state the facts upon the order-book, but the court refused to suffer any notice to be taken on the record to this proposition to file the supplemental answer and plea; and a *mandamus* is now moved for to compel the judge to sign the exceptions, and to correct the record, so as to make the answer which defendant proposed to file, and the refusal of the court to receive it, appear on the record, as a part of the proceedings.

We think there is no sufficient ground for this application. A bill of exceptions is altogether unknown in chancery practice; nor is a court of chancery bound to inscribe in an order-book, upon the application of one of the parties, an order which it may pass in a case before it; and the facts which the defendant stated in the supplemental answer and plea which he offered, furnished no ground of defence in the circuit court, when acting under the mandate of this court, and carrying its directions into execution. In the case of *Skillern's Executors* v. *May's Executors*, 6 Cranch 267, this court said, that as it appeared that the merits of the case had been finally decided in this court, and that its mandate required only the execution of its decree; the circuit court was bound to carry that decree into execution, although the jurisdiction of the court was not alleged in the pleadings. In the case now before the court, the merits of the controversy were finally decided by this court, and its mandate to the district court required only the execution of its decree. The case, therefore, comes within the principle of *Skillern's Executors* v. *May's Executors*, and the facts stated by the defendant cannot, in this stage of the proceedings, form any defence against the execution of the mandate; and consequently, he was not deprived of any legal *or equitable ground of defence, by the refusal of the court to suffer [*344 him to file the supplemental answer and plea which he offered. The motion for the rule to show cause is therefore refused.

On motion for a *mandamus* to the judge of the circuit court of the United States for the eastern district of Louisiana. On consideration of the motion made in this case by Mr. Crittenden, on a prior day of the present term of this court, to wit, on Saturday, the 17th day of February, A. D. 1838, for a writ of *mandamus*, in the nature of a writ of *procedendo*, to compel the judge of the circuit court of the United States for the eastern district of Louisiana to sign the bill of exceptions, tendered to him by the counsel for the appellee in this cause, and to permit the record of the case "to speak the truth,"

and of the arguments of counsel thereupon had, as well in support of, as against the motion; it is now here ordered and adjudged by this court, that the said motion be and the same is hereby overruled.

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*345] *Andrew Hepburn, Plaintiff in error, *v.* Jacob Dubois, Lessee of Oliver S. Walcott.

Deed of feme covert.—Effect of verdict in error.

The deed of a *feme covert*, conveying her interest in lands which she owns in fee, does not pass her interest, by force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity; in such cases, an acknowledgment gives no additional effect between the parties to the deed; it operates only as to third persons, under the provisions of recording and kindred laws. The law presumes a *feme covert* to act under the coercion of her husband, unless before a court of record, a judge, or some commissioner, in England, by a separate acknowledgment, out of the presence of her husband, or, in these states, before some court, or judicial officer authorized to take and certify such acknowledgment, the contrary appears.

Where the evidence in a cause conduces to prove a fact in issue before a jury, if it is competent in law for a jury may infer any fact from such evidence, which the law authorizes the court to infer on a demurrer to evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error, that they look to the evidence, only for one purpose, with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which made out the right of the party, on a part or the whole of his case. If, in its judgment, the appellate court hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferrible therefrom, in the same manner, and with the same legal results as if they had been definitely set out in a special verdict; so, on the other hand, the finding of a jury on the whole evidence in a cause, must be taken as negativing all the facts in which the party against whom their verdict is given, has attempted to infer, or establish, from the evidence. Dubois's Lessee *v.* Hepburn, 10 Pet. 1, affirmed.

Error to the District Court for the Western District of Pennsylvania. This was an action of ejectment, instituted by the defendant in error, for a tract of land, situated in Lycoming county, Pennsylvania, surveyed under a warrant to Joseph Fearon, and patented to him on the 19th September 1796. The case was before the court on a writ of error, prosecuted by the plaintiff in the ejectment, at January term 1836. (10 Pet. 1.)

Joseph Fearon died seised and possessed of this tract of land, at Philadelphia, in April 1810. His heirs and legal representatives were the children of his two brothers, Abel Fearon and William Fearon; both Abel and
*346] William having died in the lifetime of Joseph *Fearon. The children of Abel Fearon were Robert Fearon, of the city of Philadelphia, since deceased; Joseph Fearon, of Northumberland county, Pennsylvania; Sarah Fearon, since intermarried with Christopher Scarrow, residing, at the time of the death of Joseph Fearon, in England; Elizabeth Fox, afterwards intermarried with Joseph Fox, then residing in England, and afterwards in Philadelphia. The children of William Fearon were John Fearon, formerly residing in Centre country, Pennsylvania, since deceased; William Fearon, also residing in Centre county; James Fearon, residing in Philadelphia; Sarah Fearon, intermarried with Robert Quay, residing in Lycoming county, Pennsylvania; and Nancy Fearon, intermarried with Samuel Brown, residing in Centre county, Pennsylvania. By deed of partition, dated the 12th and 26th days of March 1825, Willi ron's heirs made, on their part, par-

tition of the real estate of Joseph Fearon, between the two branches of the family of Joseph Fearon; and by that deed, the tract of land for which this ejectment was brought, No. 5615, was allotted, *inter alia*, to the heirs of Abel Fearon. The deed of partition from the heirs of Abel Fearon, to the heirs of William Fearon, was executed on the 12th March 1825, by Joseph Fearon, in person, and by Elizabeth Fearon, and Christopher Scarrow and Sarah his wife, by power of attorney to John Curwen and John Wilson; the power of attorney was dated on the 11th day of February 1811. The privy examination of Mrs. Scarrow to the power of attorney, was not taken. On the 13th November 1827, a partition was made by the heirs of Abel Fearon, by which partition of the part of the estate of Joseph Fearon, conveyed to them by the heirs of William Fearon, was made. The deed of partition was executed by Joseph Fearon, Jacob Fox and Elizabeth Fox, in person, and by Christopher Scarrow and Sarah Scarrow, by their attorney, Nathaniel Nunnelly. The power of attorney to Nathaniel Nunnelly was dated on the 25th June 1828, without the privy examination of Mrs. Scarrow. This power of attorney was ratified and confirmed, with the privy examination of Sarah Scarrow, on the 8th September 1832, by Christopher and Sarah Scarrow. The premises for which the ejectment was instituted were, by these conveyances and confirmations, vested in Joseph Fox and wife; who, by deed of 16th April 1830, conveyed the same to Benjamin E. Valentine; from whom they afterwards came, by regular conveyances, to the lessor of the plaintiff in the ejectment.

*The plaintiff in error, the defendant in the district court, claimed the tract of land for which the ejectment was brought, under a sale [*347 of the same for county and road taxes for the year 1825, made under the laws of Pennsylvania, amounting, together, to $1.95. The county tax was assessed prior to the 1st of February 1825; the road tax was assessed on the 29th April 1825. On the 12th June 1826, the tract No. 5615, was sold to the defendant for the sum of $5.52, the amount of the taxes and the costs; and on the 15th July 1826, the same was conveyed by deed to the defendant, by Mr. Brown, treasurer of the county.

The plaintiff below, to overthrow the tax title of the defendant, gave in evidence an offer to redeem the property sold for taxes; which offer was made by Robert Quay, jr., acting for, and under the directions of, his father, Robert Quay, Esq., within two years after the sale for taxes. The treasurer of the county refused to receive the amount of the taxes from Robert Quay, jr., so representing his father, Robert Quay, Esq., alleging that Robert Quay was not the owner of the land, and that by the law of Pennsylvania, no one but the owner, or his authorized agent, could redeem land sold for taxes.

The cause was tried in October 1836, and a verdict was given for the plaintiff, under the charge of the court. The defendant excepted to the charge of the court, and prosecuted this writ of error.

On the trial of the cause in the district court, the counsel for the plaintiff in the ejectment requested the court to charge the jury: 1. That the law authorizing the redemption of land sold for taxes (viz., the law of Pennsylvania, passed the 3d of April 1804, and its several supplements) ought to receive a liberal and benign construction, in favor of those whose estate would be otherwise divested. 2. That under the said law, any person had a right

to redeem unseated lands sold for taxes, by a payment of the tax, costs and percentage, within the time named in the said acts. 3. That any person having, or believing himself to have, an interest in the lands so sold, had a right to redeem the same, within the time named in the said acts. 4. That any person having the charge of such lands from the owner, during his life, after his decease, intestate, and without a countermand of such charge, had
*348] a right to redeem such lands so sold. *5. That any person being a tenant in common of the land so sold, had a right to redeem. 6. That the deed of partition, dated the 26th March 1825, in evidence in this cause, did not take effect as a divestiture of the estate of Robert Quay and wife, in the land claimed in this ejectment, tract No. 5615, until the same was consummated by its ratification by Christopher Scarrow and wife, by their deed on the 8th September 1832: the said Robert Quay, in right of his wife, was a tenant in common of the said tract No. 5615, and had a right, in May 1828, to redeem the same from the sale for taxes. 7. That the refusal of the treasurer to receive the redemption-money for lands so sold for taxes, was equivalent to, and dispensed with, a tender of the same.

The court instructed the jury, as requested in the plaintiff's first proposition. The instruction asked in the second proposition was refused. On the third proposition, the court said: "Any person having an interest in land so sold, has a right to redeem the same, within the period named in the act; but a mere option, without right, or having an interest, confers no power to redeem." The court refused the instruction asked in the fourth proposition; and in answer to the fifth proposition, said: "A tenancy in common, or any other interest in the land, legal or equitable, confers a right to redeem." The court gave the instruction asked in the sixth and seventh propositions.

The counsel for the defendant requested the court to instruct the jury as follows: 1. That by the legal construction of the several letters of attorney, and the ratifications and confirmations thereof, and of the various deeds given in evidence in the trial of this cause, Robert Quay, at the period of the sale of this tract of land to A. D. Hepburn, and at the time the alleged offer to redeem was made, had, neither in law nor in equity, a right to the possession, enjoyment or ownership, or a right of entry to the land in controversy; and could not make a legal offer to redeem, which would avoid the title of the defendant, unless he was the authorized agent of the owner. 2. That the partitions of 1825, being executed by the duly-authorized attorneys in fact of Christopher Scarrow and wife, and Elizabeth Fearon and Joseph Fearon, representatives of Abel Fearon, in conjunction with the
*349] heirs of William Fearon, and possession having *been taken in accordance with the deeds, were binding on all the parties, and valid. 3. That, at all events, said partition was binding on Mrs. Scarrow, during her coverture, and could only be avoided, if at all, by her or her heirs, on the death of her husband; no other person having the right to object thereto; and she having ratified and confirmed it during coverture, the plaintiffs, or Robert Quay, could not impeach the validity of the said partition, as of the date of 12th March 1825. 4. That it is not necessary for a *feme covert* to acknowledge an agreement, or power to make partition, under the act of the 24th February 1770, of lands which descended to her, in Pennsylvania, where the partition was equal at law; being compelled to make partition, she could

do so amicably. 5. That Quay, and Fox and wife, and their alienees, were estopped from questioning the validity and consummation of the partitions in 1825, by their execution and delivery of the various deeds and letters of attorney given in evidence on the trial of this cause. 6. That the denial of the agency and ownership of Quay, by Fox, and his right to redeem, if the jury believed Harris's testimony, was conclusive ; and precluded him, or his alienees, from subsequently claiming any right by or through the acts of Quay or his son. 7. That on the legal construction of the act of 1815, no person had a right to redeem land sold for taxes but the owner, his heirs or assigns, or legally authorized agent or representative. If the jury believed that Quay was not the owner, or the agent of the owner, the alleged offer to redeem made by him, or his son, were of no validity ; and the plaintiff could not recover. 8. That if Quay did not make the alleged offer to redeem, as owner, or agent of the owner of the land, but in fraud of the owner's right, and for the object of benefiting himself by taking the timber off, and obtaining a right to, the land, it would not divest the title of the defendant. 9. That the offer to redeem must be a legal tender, unconditional and unrestricted ; and if the jury believed the testimony of Robert Quay, jr., no such legal tender was made ; nor was it such an offer and refusal, as would bring this case within the saving clause of the 4th section of the act of the 13th March 1815. 10. That from the testimony disclosed, the taxes for which the land was sold were assessed ; and that the deed from the treasurer to *the defendant, on its face, vested in him a complete title to the land in controversy. 11. That if the jury believed the testimony [*350 of Robert Quay, jr., and of Joseph F. Quay, neither of them were the agents of Jacob Fox, under whom the plaintiff claimed, when Robert Quay, jr., called on Harris to attempt to redeem the tract of land in dispute ; therefore, the plaintiffs could not recover.

The court refused to give the first instruction. As to the second proposition, the court said : "So far as it is necessary to the issue on trial, the legal effect of the partition of 25th March 1825, is noticed in answer to the sixth instruction of the plaintiff's counsel : the deed of partition of the 12th of March 1825 and the possession which it is alleged was taken in accordance with the deeds, cannot vary that instruction." As to the third instruction, the court said : "The supreme court have in effect decided this point ; Mrs. Scarrow's interest remained undivided, until the deed of confirmation in 1832 ; the partition of March 1825, was not binding on her, until then ; and although Robert Quay and wife cannot impeach its validity, they held, until then, an undivided interest in the land in question." The court refused to give the fourth instruction, on the authority of the decision in 10 Pet. 22. As to the fifth instruction asked, the court said : "Quay and wife, and Fox and wife, and their aliences, were estopped from questioning the validity of the partitions of 1825, after they were legally accepted by all the parties to them ; and the various deeds and letters of attorney derive their validity from that acceptance." The sixth instruction was refused. As to the seventh and eighth instructions, the court said : "A redemption of land sold for taxes, under the act of 1815, can only be made by the owner, his heirs or assigns, or legally authorized agent or representative ; or by a person acting for the owner, with his subsequent ratification ; if Quay was not the owner, or part-owner, or the agent of the owner, the alleged offer

to redeem, made by him or his son, not so ratified, has no validity; and the plaintiff, in such case, could not recover; but Quay's interest in the land was not divested, at the time he caused an offer to be made to redeem; and that offer cannot, therefore, be legally regarded as in fraud of any person's rights." 9th. The offer to redeem must be of the nature here stated; but
*351] from the testimony of Robert Quay, and other witnesses to the *same point, the tender made was sufficient, under the saving clause of the act of March 1815. The tenth instruction was given, as was also the eleventh, except the concluding words, "therefore, the plaintiff cannot recover."

The case was argued, at large, on all the points presented by the bill of exceptions, orally, by *S. Hepburn*, and a printed argument, by *Potter*, for the plaintiff in error; and by *Tilghman* and *Anthony*, on a printed argument, for the defendant. The opinion of the court having been confined principally to one point, it has not been considered necessary to report the whole of the arguments of the counsel for the plaintiff or the defendant.

The counsel for the *plaintiff* in error presented the following points to the court: 1. That Robert Quay, at the time of the alleged offer to redeem, under the legal construction of the two deeds of partition, between the heirs of Abel and William Fearon, and the ratifications and confirmations thereof, and of the various deeds and articles of agreement given in evidence, could not make a legal offer to redeem. 2. That the partition was binding on Mrs. Scarrow, during coverture, and could only be avoided by her, or her heirs, on the death of her husband, who was yet in full life. 3. That it was not necessary for a *feme covert* to acknowledge an agreement or power to make partition, under the act of the 24th February 1770, of lands which descended to her in Pennsylvania, when the partition was equal. 4. That Quay and wife, and Fox and wife, were estopped from questioning the validity of the partitions of 1825, by their execution of the several deeds, &c., given in evidence. 5. That the denial of the agency and ownership of Quay, and of his right to redeem, by Fox, was conclusive on him and his alienees; and precluded them from claiming, subsequent to such denial, any right of redemption, by or through the acts of Quay and his son. 6. That the court below erred in their answers to the 1st, 2d, 3d, 4th, 5th, 6th, 8th and 9th points submitted.

After stating that the facts embodied in the record of the present case presented new and distinct considerations for the court, from those embodied in the record of the former trial of this suit between the same parties; Mr. *Hepburn* proceeded to state the title of the defendant in error; and
*352] showed that title, traced from Joseph Fearon, *the elder, who was the original warrantee of the commonwealth of Pennsylvania, down through the different divisions and partitions of the real estate of Joseph Fearon, deceased, amongst his heirs-at-law, to the defendant in error. He then proceeded to state the title of the plaintiff in error (the defendant below), which was derived from the treasurer of Lycoming county, by deed, dated 15th July 1826, under a sale of the tract of land in question for taxes, due and unpaid, previous to such sale, under the provisions of the different acts of assembly in relation to the sales of unseated lands in Pennsylvania. He referred to the different acts of assembly applicable, and contended, that

in terms, the right of redemption attempted to be set up by Robert Quay, in May 1828, was unauthorized by the provisions of those acts, and could not divest the title of the purchaser, acquired by him under the sale. And after reviewing the facts in relation to the situation, and rights of the several parties in interest, under the different deeds of conveyances, partitions and confirmations thereof, by the different perties in interest, together with the facts in relation to the alleged offer to redeem the land sold, by Robert Quay; Mr. *Hepburn* assumed the following general propositions, for the consideration of the court:

1. Whether, under the facts disclosed by the record in this case, upon a proper construction of the different acts of assembly of the state of Pennsylvania in relation to the sale of unsettled lands for taxes, Robert Quay had such an interest in the tract of land in dispute, No. 5615, at the time of the sale of it for the taxes, by the treasurer of Lycoming county, on the 12th of June 1826, or at the time the alleged offer the redeem was made by his son, under his directions, in May 1828, as brought him within the saving provisions of the fourth section of the act of 1815, and authorized a tender of the redemption-money by him. In other words, was Quay the owner, or agent of the owner, of the tract of land in dispute, on the 12th of June 1826, or in May 1828.

2. Was the tender such as is contemplated by the act of 1815, viz., a "legal tender;" and has it been followed up by the defendant in error (plaintiff below), so as to enable him to claim the benefit of it in this suit?

3. Can the defendant in error, under the facts disclosed by the record, take advantage of the tender of the redemption-money, by Quay, or his son (if the court should be of opinion there was a legal one), contrary to the express dissent of Jacob Fox, the owner at the *time, and when he had given the treasurer notice that Quay had no right to the land in [*353 controversy; and when he had afterwards approved the act of the treasurer, in his refusal of the tender made by Quay?

4. The construction of the acts of assembly of the state of Pennsylvania in relation to the sale of unseated lands for taxes by the supreme court of Pennsylvania.

Under the first proposition, Robert Quay had no pretension of ownership to the tract, No. 5615; in point of fact, he expressly says so in his own deposition; tells others he has no interest as owner; these facts are fully proved by the record. He never pretended, that he was the agent of the owner; and Fox has been equally explicit in his denial of Quay's agency, in relation to this alleged tender. These facts are also apparent upon the record.

Were the parties to the different deeds embodied in the record, mistaken as to their rights? And had Robert Quay, in contemplation of law, such an interest as owner, or part owner, of the tract of land in dispute, as authorized his tendering the redemption money? If the partitions of 12th and 26th of March 1825, were perfect, and vested the estate of the grantors, in the grantees of those deeds, the question is answered. And we say, they did, without the separate examination of Mrs. Scarrow, in accordance with the 2d section of the act of 24th February 1770. This section changed the common law mode of conveyance, and was intended to supply the place of fines and recoveries. But it does not embrace the case of partition of lands,

which descended under the intestate laws of Pennsylvania. It is true, that lands descend to the heirs-at-law, in Pennsylvania, as tenants in common, but with scarcely an incident connected with that kind of an estate at common law; they are tenants in common, in pursuance of the statute regulating descents in Pennsylvania, and are placed more upon the footing with coparceners in England, or at common law, than any other description of tenants of real estate.

Tenants in common, at common law, were not compelled to make partition of their estates; they always derived their title by purchase. Hence, livery of seisin was necessary to vest their estate; and the same notoriety was required to divest it, and vest in their grantee. Not so with coparceners at common law, nor with the estates of those derived under our intestate
*354] laws. They both take by descent; *the law casts the estate upon them all equally, and they are alike in the possession. It never was pretended, that levying a fine, or suffering a common recovery, was necessary to vest the estate absolutely in a grantee coparcener, of lands allotted to them in partition of their estates; because the partition only adjusts the different rights of the parties to the possession; neither take by purchase. It is less than a grant, and neither amounts to, nor requires, an actual conveyance. Alnatt on Partition 124–5, and authorities there cited. An infant is compelled to make partition. Ibid. 11. A *prochein ami* may do it for him. Ibid. 12. Parties are compelled to make partition, as well under the statute of descent, as at common law, and may do it amicably. Alnatt on Partition 9; Co. Litt. 171 *a*, Hargrave's note; *Long* v. *Long*, 1 Watts 265, 268–9; *Bavington* v. *Clarke*, 2 P. & W. 124; 3 Burr. 1801. A parol partition, followed by a corresponding separate possession, is good, in Pennsylvania. *Ebert* v. *Wood*, 1 Binn. 216. A parol partition was good at common law, between coparceners. Litt. § 252; 3 Co. Litt. 169 *b*.

A guardian, in Pennsylvania, though not vested with a *scintilla* of either legal or equitable estate in the lands of his ward, may make a consentible line, and mark the boundaries of his land, with an adult, which will be binding. 10 Serg. & Rawle 114. And a partition is nothing more than a mere designation of boundary; it passes no interest in the estate to the grantee, other than that originally held. The parties in this case had done nothing more than they would have been compelled to do, upon the application of either party to the proper court. He referred to practice in the orphans' court of Pennsylvania, as well as that of the common pleas; where partitions of estates are made on application of husbands alone, the wives not parties. But the supreme court of Pennsylvania have given a construction to the act of 24th February 1770, and say, in so many words, that the acknowledgments of *femes covert* are not necessary, in cases of partition. 3 Rawle 420. This decision, if recognised by this court, puts an end to any difficulty that may be urged for the want of a proper acknowledgment. The statute is a local one; and this decision has, at least, become a rule of property in the state in which it was made, and as such recognised by this court. The case is analogous to the one before the court.

*355] *If this decision is disregarded by this court, the partition was, at all events, binding upon Mrs. Scarrow, during her coverture; and could only be avoided by her, after the death of her husband, or her heirs, after her death. The deed was not void, but voidable at most, only as to

her or her heirs. Cowp. 201 ; 1 Watts 357. The conveyance is not void, but the grantees fail to produce the proper kind of evidence of the execution of it ; and so long as the claim of Mrs. Scarrow is not asserted, the whole estate passed to the grantees in those deeds, subject only to her right of re-entry (Alnatt on Partition 22 ; Co. Litt. 170 *b;* Preston on Abstracts of Title, vol. 1, p. 334–5 ; 2 Kent's Com. 133 ; Clancey on Rights, 161–2) ; and did pass to them as of their dates. Conceding this right to Mrs. Scarrow, or her heirs, after her death, can the parties to those deeds, whose execution of them was perfect, deny the validity of their acts, and take advantage of her privilege ? Certainly not. Though the deed may be voidable as to her (which we deny), it is valid and binding upon all the others, and they cannot pronounce it invalid. 6 Cranch 88 ; 1 Kent's Com. 414 ; 2 Serg. & Rawle 383, 387, 390 ; 10 Ibid. 117 ; 1 Watts 266. If the other parties interested in this partition cannot take advantage of the alleged defect, and the privilege is a personal one to Mrs. Scarrow, can she now take advantage of it ? A recital of the facts on the record, is a solution of this inquiry. She has done all in her power to confirm the estates of all the parties in interest. Confirming acts of the legislature of Pennsylvania, remedying defectively acknowledged instruments, are not uncommon. 10 Serg. & Rawle 101 ; Act of 3d April 1826, P. L. 187–8.

The construction given to those statutes uniformly has been, not that the conveyance was void, but that the evidence was defective as to its execution. And suppose, the fact of the examination actually to have taken place, but not embodied in the certificate of the officer ; the deed would not divest the right of the *feme covert*, because the party could not prove, by any other testimony than the acknowledgment itself, the fact of its having actually occurred. When the legislature, therefore, dispense with that form of proof, the title is perfect as of the date of the original execution of the instrument. 16 Serg. & Rawle 35 ; 1 Watts 330; 10 Pet. 1. The ratification must operate as a divestiture of the interest of Mrs. Scarrow, by relation to the date of the deed of 12th March *1825; or the plaintiffs [*356 below, defendants in error, cannot sustain this suit. 6 Binn. 454. Their title is derived through these deeds, and the suit instituted two years before the ratification of Mrs. Scarrow; and if, by relation, it enables them to sustain this suit, brought in 1830, certainly, it is good for every other purpose.

The argument on the remaining propositions, is omitted, for the reasons already stated.

Tilghman and *Anthony*, for the defendant, upon the questions presented as to the operation of the deeds of partition, argued : It is alleged by the counsel for the plaintiff in error, that it is not necessary, in Pennsylvania, for a *feme covert* to acknowledge a power of attorney to make partition, under the act of 24th of February 1770, of lands which descended to her, when the partition is equal ; and on this point they have cited *Rhoads's Appeal*, 3 Rawle 420, decided March 30th, 1832. To this there are several satisfactory answers. The first is, that the question does not arise in the present case.

A careful examination of the power of attorney, dated 11th February 1811, from Christopher Scarrow and Sarah his wife, and Elizabeth Fearon,

to Joseph Curwen, John Curwen and John Wilson, under which the alleged partition was made, will show it contained no authority to them to make either a partition or an exchange. It recites, that they and their brother, and the children of William Fearon, deceased, are the next of kin of Joseph Fearon, their deceased uncle, and as such, "they, the said Christopher Scarrow and Sarah his wife, in her right, and Elizabeth Fearon, have, together with the said Joseph Fearon, their said brother, and the children of the said William Fearon, deceased, become seised or possessed of, or otherwise well entitled to, divers messuages, lands, tenements, plantations, property and possessions, in the province or state of Pennsylvania aforesaid, and elsewhere in North America aforesaid, late the estate of the said Joseph Fearon, deceased, and all other the estate and effects whatsoever, which he, the said Joseph Fearon, died possessed of, in certain parts, shares and proportions; and they, the said Christopher Scarrow and Sarah his wife, and Elizabeth Fearon, being minded and desirous to procure the actual seisin and possession of their said respective parts, shares and proportions of the said messuages, lands, tenements, plantations, properties and possessions, and to sell and dispose thereof, and convert the same into money, and to
*357] settle the *accounts and affairs of the said Joseph Fearon, deceased;" they then proceed to constitute the said Joseph Curwen, John Curwen and John Wilson, jointly and severally, "as their attorneys and attorney, and to and for each and every of their use and benefit, to enter into, along with, or without, their said brother, the said Joseph Fearon, and the children of the said William Fearon, deceased, and take possession of each and every of their respective parts, shares and interest of and in all and singular the said messuages, lands, tenements, plantations, properties and possessions, in any part of North America aforesaid, or any island contiguous thereto, wherein or whereto the said Christopher Scarrow and Sarah his wife, in her right, and Elizabeth Fearon, or any of them, have or hath any estate, right, title or interest, as two of the next of kin of the said Joseph Fearon, deceased, or otherwise howsoever. And also, for them, the said Christopher Scarrow and Sarah his wife, and Elizabeth Fearon, and in their and each and every of their names, or in the names of them the said Joseph Curwen, John Curwen and John Wilson, or any of them, as their or any of their attorneys or attorney, to put up and expose to sale (along with, or without, the consent of the said Joseph Fearon, their said brother, and the children of the said William Fearon, deceased), either at public auction or by private contract, as they, the said Joseph Curwen, John Curwen and John Wilson, or any of them, shall think proper, all their, and each and every of their, respective shares, parts and interests, of and in all and singular the said messuages, lands, tenements, plantations, properties and possessions, with the stock, cattle, implements, tools, utensils, furniture, effects and other things thereto belonging; and to sell, and contract and agree to sell, their, and each and every of their, estate, right, title, share and interest, of and in the said the several premises, either entire or in parcels, to such person or persons, and his or their heirs, executors, administrators and assigns, as shall contract or agree to become purchaser or purchasers thereof, or any part or parts thereof, for such price or prices as they the said Joseph Curwen, John Curwen and John Wilson, or any of them, shall, together with, or without, the said Joseph Fearon, and the said children of the said William Fearon,

think proper to accept for the same. And in pursuance of the contracts to be made for the sale of their said parts, shares, estates and interests, respectively, of and in the said several premises for them, the said Christopher Scarrow and Sarah his wife, and Elizabeth Fearon, and each and every of them, and in their each and every of *their names or name, or in their or any of their own proper names or name, as their attorneys or [*358 attorney, and as their, and each and every of their, act and deed, to sign, seal deliver and execute, all and every such deeds, conveyances, instruments and writings, as shall or may be requisite or necessary for conveying and assuring their respective parts, shares and interests of and in the said several premises, and every or any part or parts thereof, to the person or persons, and his or their heirs, executors, administrators and assigns, who shall contract or agree for the purchase thereof, or of any part thereof; and to receive the money to be paid by the purchaser or purchasers of the said several premises, or any part or parts thereof. And on receipt thereof, for them, the said Christopher Scarrow and Sarah his wife, and Elizabeth Fearon and each and every of them, as their and each and every of their attorneys or attorney as aforesaid, to sign, seal or deliver any receipts, releases or other acquittances or discharges, for the said purchase-money; and also for them, the said Christopher Scarrow and Sarah his wife, and Elizabeth Fearon, and in their and each and every of their names or name, or in the names or name of them, the said Joseph Curwen, John Curwen and John Wilson, or any of them, as their and each and every of their attorneys or attorney as aforesaid, to contract for, make, do, sign, seal, deliver and execute all and every deed, instrument, writing, contract, receipt, agreement, matter and thing whatsoever, which shall or may be requisite or necessary for completing the sales and conveyances above mentioned, and for accomplishing the several purposes aforesaid, of any of them."

In all this, there is not a trace of any authority to make either a partition or an exchange. The parts, shares and proportions were such as they became entitled to, together with their brother, and the children of William Fearon. It was these parts, shares and proportions that the attorneys in fact were to take possession of, and to sell. They were undivided parts, shares and proportions, such as existed in Sarah Scarrow and Elizabeth Fearon, as tenants in common with the other heirs of Joseph Fearon, at the date of the power. Surely, it will not be contended, that the attorneys in fact were to take possession of a portion allotted in severalty to Sarah Scarrow, and to hold this several possession, along with her brother and the heirs of William Fearon. So with respect to the sale. The intention was, as the words are, to confer a power to take possession of, and to sell only the undivided right. In this view, all *is intelligible [*359 and consistent; and in no other way can the intervention of the brother, and the heirs of William Fearon, be reconciled.

The word partition, or exchange, is not to be found in the instrument; yet nothing could be more natural than to use the word, if the thing was intended. This article derives additional strength from the fact, that when, on the 25th June 1828, Christopher Scarrow and wife executed a power of attorney to Jacob Fox and Nathaniel Nunnelly, to make partition of the estate of Joseph Fearon, the appropriate words, "partition and divide," are repeatedly used. There might be excellent reasons why the two Curwens

and John Wilson should be trusted to sell an undivided right in this estate, and yet not to be trusted to make a division of it. The property was scattered over a wide range in Pennsylvania, near to and among the Allegheny mountains ; a part of it was in Virginia. The attorneys in fact resided, two of them in Philadelphia, and the other within twelve miles of that city ; several of the tenants in common lived in the vicinity of the lands, in Lycoming and Centre counties, Pennsylvania. Under these circumstances, the information possessed by the parties could scarcely be equal ; and it certainly was prudent, at that time, not to confer a power to make partition.

The sale authorized by this power was for money ; and it was only on the execution of a contract, and receipt of the money under it, that the attorneys were to execute any release or other conveyance. The release executed by them was without any other consideration than a quantity of land, estimated equal in value to that conveyed. It was not a partition, either in law or in fact; but a proceeding unwarranted by the power, attempting to divide the whole real estate into but two parts, when there were nine heirs ; without allotting any particular purpart, either to Mrs. Scarrow or any other heir. A power to sell, does not authorize a partition. 1 Madd. 214 ; 2 Sugden on Powers 506.

Another objection to the instrument called a partition, dated 12th March 1825, is, that it purports to be executed by the attorneys in fact of Elizabeth Fearon ; whereas, Elizabeth Fearon was married to Jacob Fox, in the year 1812 ; and in 1825, was a *feme covert*, and had so been for thirteen years before the alleged partition. Her husband, Jacob Fox, was, in 1825, tenant by the curtesy, at least, initiate ; yet he is no party to the instrument.

*360] *As marriage is equivalent to the civil death of the wife ; we submit, that neither Elizabeth Fearon, then Fox, nor her husband, was bound by the release.

For these reasons, we contend, that the power of attorney of the 11th February 1811, never authorized any partition ; and that if it did so, still it was not well executed. If either of these points is with us, the question cannot, in this case, be material ; which, after the decision already pronounced, our antagonists again endeavor to bring into doubt, by asserting, that the real property of a married woman may, under the laws of Pennsylvania, pass under a power of attorney, executed by her, in England, and having neither a private examination, nor acknowledgment of any kind, before a judicial officer. For this doctrine, they found themselves upon the cases of *Rhoads's Estate*, 3 Rawle 420, and *Tate* v. *Stooltzfoos*, 16 Serg. & Rawle 35 ; the application and binding effect of which we will proceed to discuss.

As the case in 16 Serg. & Rawle 35, can be very shortly disposed of, it will be first noticed. It decides, that "the omission to state in the certificate the acknowledgment of a release by husband and wife, that the wife was separately examined, is cured by the act of 3d of April 1826. The land was in Lancaster county, Pennsylvania, and an acknowledgment of the release was made by the husband and wife, on the 28th May 1798, before an associate judge of the court of common pleas of that county. This act of 3d April 1826, will be found in Purdon's Digest (5th edition) 260–1. It was a retrospective and retroactive law. Such legislation is always short-

sighted and weak in policy, and sometimes wicked in design, as well as effect. Judge DUNCAN, in delivering the opinion of the court, admits, "that the retrospective powers of this act were to be construed strictly; and that every law of this nature is to be construed with strictness, and not extended by equity beyond the words of the statute," &c. Now, both the preamble and the enacting clause of this statute, apply only to cases where: 1st. There has been an acknowledgment by the husband and wife; in the present instance, there was no acknowledgment whatever. 2d. The acknowledgment must be "before some judge, justice of the peace, or other officer authorized by law, within this state, or an officer in one of the United States, to take such acknowledgment." In the present instance, the power of attorney was executed without the United States, and never acknowledged. *Therefore, both the retrospective law and the decision fail to affect us. [*361

Next, as to *Rhoads's Estate*, 3 Rawle 420. That case arose under an amicable partition, *in pais*, among the parties. The devisees agreed, that certain persons, named by them, should divide their land for them; they accordingly went on it, and did appraise part, and divide the land, and allotted to each devisee his purpart. The several devisees took actual possession of their shares, and occupied, improved, and in some instances, sold their parts. In delivering the opinion of the court, Judge ROGERS says: "When we couple the words of the deed, with the acts of the parties, in taking possession of their respective proportions in the agreement, improving and selling parts of the same, the intention cannot be mistaken:" and again, "in partition in the orphans' court, the wife is not made a party; the order, is made on a petition by the husband, and in right of his wife." 3 Rawle 436.

By referring to the adjudicated cases in Pennsylvania, it will be seen that even a parol gift of lands, by a father to his son, is good, when possession accompanies and follows, and when improvements are made by the son on the land, in consequence of the gift. It is the delivery of possession, and expenditure of money or labor in consequence of the gift, that takes it out of the statute of frauds. *Stewart* v. *Stewart*, 3 Watts 253; *Eckert* v. *Eckert*, 3 P. & W. 332. These cases review the doctrine of *Ebert* v. *Wood*, 1 Binn. 216; and clearly show, that the subsequent separate possession and improvements made the gift valid, and took it out of the act for preventing frauds and perjuries. 21st March 1775, Purdon's Digest 408.

Another mode in which married women may make partition, is under the act of 19th April 1794, directing the descent of real estate, § 22; and in case the property cannot be divided, it may be sold, under the act of 2d April 1804, and thus the wife be divested of her real estate by proceedings in the orphans' court. This, however, is a matter under the supervision and control of the court; who will, as far as possible, protect the rights and interests of married women, and prevent any undue advantage being taken of their dependent situation. In *Watson* v. *Mercer*, 6 Serg. & Rawle 50, Chief Justice GIBSON deprecates, in strong language, the inefficiency of our laws for the protection of the property of *femes covert*, and says: "In no country are their interests and estates so entirely at *the mercy of their husbands, as in Pennsylvania; and that it is the policy of the law, to narrow the field of this controlling influence. The husband has [*362

power to obtain her personal estate, not only without condition, but, in some instances, by means of the intestate acts, even to turn her real into personal estate, against her consent." This evil was, however, remedied, on the 29th March 1832, when the legislature of Pennsylvania, aware of the injustice and oppression frequently practised on married women, remodelled the orphans' court law, and secured their interest in real estate against the rapacity of unprincipled husbands; unless they freely and voluntarily relinquished them before a judge of a court of record, in the absence of the husband. See Purdon's Digest 788, Partition, § 48.

In *Vidal* v. *Girard*, 1 Miles 322, decided September 10th, 1836, Judge JONES, refused to order a writ of sale, without a writ *de partitione faciendâ*, after a judgment *quod partitio fiat;* although the wives and their husbands should file an agreement to that effect. In that case, he explains the various kinds of partition, and states, that where an action of partition is resorted to, instead of a deed of partition, or other conveyance, they must pursue the act relating to that action. If the wife convey by deed, under the act of 24th February 1770, it must be acknowledged in a peculiar form. Her deed is void at common law; and in England, she can only convey her estate by fine. She cannot appear by attorney, but must appear in person, or by an attorney appointed by her husband; and in conclusion, the judge refuses to waive any proceedings which protect the wife in the enjoyment of her real estate.

The case of *Peter Rhoads's Estate*, 3 Rawle 420, may have been well decided as to the partition then before the court. But it does not apply to our case, of a division exclusively by deed, where a part of the real estate belonged to a married woman, who never acknowledged the power under which it was made, and never was separately examined. The counsel in that case, when arguing in favor of the partition, find themselves compelled to admit, that if the partition had been equal, perhaps, it might be voidable by the married woman, though not void. This is enough for our purpose; for if the partition in May 1828, was voidable by Mrs. Scarrow, when Robert Quay made the offer to redeem; he had an interest in this very tract, 5616, which, if she refused to sanction the irregular partition, was common property. Now, the fact, that the division made among the various heirs
*363] of Joseph Fearon was an equal partition, is most adroitly *assumed by the plaintiff in error; not one word of evidence exists to prove it. When did it become equal, and in what way? Not until the 8th September 1832, when Mrs. Scarrow, in legal form, ratified what had been done.

But in May 1828, when Quay redeemed the land, there was no such equality, in point of fact, or in point of law. In fact, it never existed; in law, it did not exist until 8th September 1832. Until that date, she and her husband never knew that any partition, or attempt at a partition, had ever been made. There does not exist any evidence to show they had such knowledge. There is direct and clear proof to the contrary, so late as the 25th June 1828. which was about a month after Quay redeemed the premises in dispute. For, in the power of attorney of that date, from Christopher Scarrow and Sarah his wife to Fox and Nunnelly, they authorize their said attorneys "to make partition and division of the whole of the said messuages, lands, tenements, plantations, properties, possessions and premises, late of the said Joseph Fearon, deceased, unto, between and among the said Joseph

Fearon (her brother), the children of the said William Fearon, deceased, Jacob Fox and Elizabeth his wife, and the said Christopher Scarrow and Sarah his wife." That is, to divide *all* the property among *all* the heirs. This important fact is noticed in the opinion of the court, 10 Pet. 21–2.

Without pursuing the argument further, it is sufficient to remark, that the case reported in 3 Rawle 420, is essentially different from the present; inasmuch as the former was a partition *in pais*, and the latter, a partition by deed.

Although the counsel for the plaintiff in error allege, that the power of attorney from C. Scarrow and wife, and Elizabeth Feason, to John Curwen and John Wilson, gave them authority to make and execute deeds of partition; yet, as before stated, on examination, it will be found, that there was not a syllable said about partition therein, nor was there any separate examination of the wife of C. Scarrow. In pursuance of this supposed authority, Curwen and Wilson, as well as the heirs of William Fearon, proceed to execute deeds of release, in March 1825; and recite, that "in consideration of a quantity of land to be conveyed by a like release, they have remised, released and for ever quit-claimed," the lands therein mentioned; thus demonstrating that a deed of release was the kind of conveyance or assurance, by which the partition was intended to be carried into effect.

The act of 24th February 1770, § 2, declares, that no grant, *bargain and sale, lease, release, feoffment, deed, conveyance or assurance [*364 in the law whatsoever, shall be good and valid to pass the wife's estate, unless she is examined separate and apart from her husband. If, then, it be absolutely necessary to have the separate examination of the wife, in all deeds, releases, conveyances and assurances whatsoever, in order to divest her interest, can it for a moment be urged, that a power of attorney, wherein a married woman authorizes a person to release, convey and assure her lands, requires no such examinatian; or in other words, that she cannot herself convey her land, except by an acknowledgment in a peculiar form, specially provided to guard and protect her rights; but if she joins her husband in a power of attorney to a third person, no such acknowledgment is necessary; and that the third person can "remise, release and for ever quit-claim" all her estate, and it will be binding on her, to all intents and purposes? It is only necessary to state such a proposition, to expose its fallacy. Can it even be pretended, that the indentures given in evidence are not such kinds of conveyance as are mentioned in the act of 24th February 1770? A deed is a writing sealed and delivered by the parties. Releases are a discharge or conveyance of a man's right in lands or tenements to another, who hath some former estate or possession; the words generally used therein are "remised, released and for ever quit-claimed" (precisely the words used in the Fearon deeds). When one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole. 2 Bl. Com. 324.

And even if the gentlemen opposed to us call it a partition, it is that kind of partition by deed, mentioned in 2 Bl. Com. 323; which says, that it is necessary "that they all mutually convey and assure to each other," the several estates which they are to take and enjoy separately; and not a partition *in pais*, by going on the land and amicably dividing it, and each party taking possession of his proportion, living on it, cultivating and improving it. In the case of *Rhoads's Estate*, the *feme covert* did not complain of any

unfairness or inequality in the partition; it was equal and just, and was attempted to be set aside by others, in hostility to her interest, and when she acquiesced therein. But in the present case, the object of the redemption on behalf of the heirs of Joseph Fearon, deceased, was to preserve and protect the rights of each and every heir; and to prevent a part of the estate from going into the hands of a stranger, for a mere nominal consideration; and thus compelling all the heirs, among whom was Mrs. Scarrow, a *feme* *365] *covert*, to owelty of partition, *as the incumbrance was on the land when the division was consummated. *Semple* v. *Burd*, 7 S. & R. 285; Co. Litt. 174 *b*; 7 Bac. Abr. 231.

This doctrine is examined in *Feather* v. *Strochoecker*, 3 P. & W. 505, in which it is said, that "every exchange implies a warranty. If a stranger enter into the purpart allotted to a coparcener, by an older title, she may enter with the other and compel her to make a new partition." Ibid. 508. And in *Gratz* v. *Gratz*, 4 Rawle 435, the court say, "there must be a complete reciprocity of obligation, benefit and effect, arising from the agreement; otherwise, it will not be binding on either. In partition to pass the respective shares, it must be done by executing mutual releases, so as to conclude the parties from asserting their former rights." Ibid. 437.

It, however, is said, that nobody but Mrs. Scarrow could take advantage of this defect in the acknowledgment of the deed of release; and that as she was a married women, having no power to act, nor any privilege on account of her coverture, after two years, the title of the purchaser became absolute. Let us ask, of what use to her would be the avoidance of the partition, long after the title of the purchaser at treasurer's sale was consummated? She might demand a new division, because her portion of the estate had been taken away by a sale for taxes, which were a lien thereon before the division; but she and all the other heirs would thus equally lose their proportion so sold, and each heir would, therefore, be equally interested in its redemption.

In 10 Pet. 22, Mr. Justice Baldwin, in delivering the opinion of the court in this case (the facts of which have not been altered), says: "It is perfectly clear, that till the consummation of the partition, in 1832, Quay and wife held an undivided interest in the land in question, as owners thereof in common with the other heirs of Joseph Fearon." But the counsel for the plaintiff in error say, the court were wrong, and their judgment is erroneous. Let us then inquire, when Mr. Scarrow first executed the power of attorney to Nathaniel Nunnelly, not when she acknowledged it. It appears by the power of attorney from C. Scarrow and wife to Nunnelly, that it was only signed and sealed by them on the 25th June 1828, as their act and deed. So that the redemption was made by Quay, more than a month before they ever signed, or in any manner executed the power of *366] attorney; and if the private and separate acknowledgment *of Mrs. Scarrow were not indispensable, it most certainly required, that she should know of and assent to the agreement to divide the estate, before it could be legally divided; and that no act of hers, in signing the power of attorney to Nunnelly, after Quay had redeemed the land, could have a retrospective effect, and make this act of no validity. If, then, the power of Scarrow and wife and Elizabeth Fearon to Curwen and Wilson, was of no avail, or was superseded or annulled by the subsequent marriage of

Elizabeth Fearon to Jacob Fox, in 1812, thirteen years before they acted under it, there can be no further question as to Quay's right to redeem.

But it is said, that Fox disclaimed the interference of Quay, and approved of the conduct of the treasurer, in his refusal of the tender made by his son for him. To this proposition, we would reply, that if Quay had an interest in the land, it is of no consequence whatever, whether Fox assented or dissented to the redemption. He was only tenant by the curtesy of his wife's real estate, and his interest in unimproved land was trifling. And as remarked by us in the former argument of this cause, 10 Pet. 14–15, if none but the husband could redeem for his wife, the acts of assembly for the protection of the real estate of a married women would prove a mere mockery, so far as relates to unseated lands.

But the dissent of Fox, of which the counsel for plaintiff speak, was after the two years had expired; and the evidence clearly shows, that neither Fox nor his wife had any knowledge of Quay's offer to redeem, within two years after the sale. The treasurer (Harris) says, that in the fall of 1828, the last of September, or the first of October, two years and four months after the sale, he saw Jacob Fox, in Lycoming county, and he told him, that Quay had sent down an order to redeem the tract of land that Mr. Hepburn had bought, and that he had refused to take the redemption. Fox told him, he had done perfectly right, that Quay was not the owner of the land, had no right to redeem—wanted to steal timber—Mr. Hepburn had treated him like a gentleman. By referring to the testimony of Jacob Fox, it will be seen by the court, that he derived his information, about Quay's wish to steal the timber, from A. D. Hepburn, and that this caused him to use the language about Quay, which he did to Mr. Harris; but when he found, that instead of losing a little timber, by the redemption of Quay, Hepburn's gentlemanly treatment was calculated to deprive him and his wife of both timber *and land, he at once "adopted and ratified Quay's act, as saving the land for him." If, then, the dissent of Fox, [*367 under any circumstances, would avail Mr. Hepburn, it clearly appears, that as soon as he understood the situation of the tract, and that Hepburn's attempt to prejudice him against Quay was merely that he might hold the land himself, he immediately ratifies and confirms the acts of Quay so far as was then in his power; and if the testimony of Fox is to be relied on, it proves too much for the plaintiff in error, as it proves, that Hepburn agreed to relinquish the land.

The counsel for plaintiff in error urge, that Quay and wife, as well as Fox and wife, are estopped from questioning the validity of the partition of 1825, by their executing the several deeds given in evidence. To this point, we say, whether they were estopped from questioning the validity of the partition, is not the matter in controversy, but whether they were estopped from saving a portion of the land from loss and forfeiture, on account of the non-payment of the taxes due before partition was made. The county tax was assessed prior to the 1st of February 1825. The road tax was assessed on the 29th April 1825. R. Quay acknowledged the deed of release on the 26th March 1825, which was nearly two months after the county tax of $1.95 was due, for which the land was sold on the 12th June 1826. This tax was an incumbrance on the land, and any of the heirs had a perfect right to pay it, before the sale, and to redeem the land, after the

sale, to prevent a forfeiture ; so that if Quay had divested all his interest, by his deed of 26th March 1825, yet it did not divest him of the right to redeem the land from a sale which was caused by his neglect as well as that of his co-tenants, to pay the taxes due before the release, on the very land of which he was joint-owner.

There are three kinds of partition in Pennsylvania : 1st. A partition *in pais*, by going on the land and setting off to each party his respective portion, and taking possession, occupying and holding it in severalty, as was done in *Rhoads's Estate*, 3 Rawle 420. 2d. A partition by virtue of proceedings in court, as by writ of partition, in the common pleas, or by inquest in the orphans' court. 3d. A partition by deed, wherein the parties grant, assure and convey to each other their several respective purparts of the estate, to be held in severalty. It cannot be pretended, that the case before us is *embraced within either of the two first-named modes of partition. The heirs of the two branches had no intercourse. So little did they know of each other, that although Elizabeth Fearon married Jacob Fox in 1812, none of the heirs of Mrs. Fearon appear to have known it in March 1825, when the deeds of release were executed. William Fearon, one of the heirs, swears, that no division had ever been made of the estate of Joseph Fearon, previous to those writings in 1825 : he says, "I mean the deeds of March 1825. Both branches were never got together on the ground and made a division. There never was a parol division of these lands between the two branches ; there never was a division by word of mouth that I know of ; never any other division than the one set forth in the deeds of March 1825. The tract, No. 5615, I never saw." And Joseph F. Quay says, that Jacob Fox and wife never had actual possession of No. 5615. His wife never saw it. C. Scarrow and wife never had actual possession of any of the Fearon lands. They were never in America.

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A partition *in pais* is, therefore, out of the question ; and there is no pretence of any proceedings in partition in either the common pleas or orphans' court. It irresistibly follows, that it is a partition by deed ; and the supreme court in this cause say (10 Pet. 20) : "There must be such acceptance of a deed of partition, as would amount to an estoppel, before the estate can be held in severalty ;" and (page 20), "that there was a fatal objection to the power of attorney, as there was no separate examination of Mrs. Scarrow, or any acknowledgment by her :" and let us again remark, that the power of Scarrow and wife to Curwen and Wilson, is in the same predicament, and therefore, in the language of the court (page 22), "gave no authority to affect Mrs. Scarrow's real estate, till the deed of confirmation, of 8th September 1832 ;" and until that period, "the partition was *in fieri*, and the estate remained undivided."

Potter, for the plaintiff in error, presented the following printed argument, on the points decided by the court : The first point, to which I respectfully call the attention of the court, is, what was the situation of the title, to the land in controversy on the — of May 1828, when the alleged offer to redeem, by Robert Quay, was made? and what interest, if any, had he, at that period, in the lands, which entitled him to the possession, or gave him a right of entry of the whole or any part thereof?

*In 1810, on the death of Joseph Fearon, the patentee, the estate, of which this tract constituted a part, descended, by the laws of Penn-

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sylvania, to his heirs and legal representatives, who were the children of his two brothers, Abel and William, both death, in the lifetime of the said Joseph. The children of Abel, who survived at the death of Joseph, who took a moiety of the estate by descent, were Joseph, Sarah, intermarried with C. Scarrow, and Elizabeth, who afterwards married Jacob Fox. The children of William, were John, since deceased, William and James, Sarah, intermarried with Robert Quay, and Nancy, intermarried with Samuel Brown, who took the other moiety. On the 11th of February 1811, Scarrow and wife, and Elizabeth Fearon, executed, in England, letters of attorney to John Wilson and others. In 1812, Elizabeth Fearon married Jacob Fox, in England; and from that period up to 1825, Scarrow and wife, and Fox and wife, wrote letters to their attorney in fact, Wilson, requesting a division of the estate between the two branches of the Fearon family; and in 1825, it is proved, that Joseph M. Fox, Esq., "was authorized to divide the land," by the heirs of Abel Fearon; on the 12th of March 1825, a deed of release and partition was executed by Joseph Fearon and Scarrow and wife, and Elizabeth Fearon, now Fox, by their attorneys in fact, Wilson and Curwen, to Robert Quay and others, the children of William Fearon, deceased; this deed, and all the patents and title-papers for the whole estate, was taken by Joseph M. Fox, Esq., and carried to the house of William Fearon, with the deed of the 25th March 1825, from R. Quay *et al.*, to C. Scarrow *et al.*, which was then executed by the representatives of William, and the respective deeds were mutually delivered, the title papers divided, and each family received the titles for the respective tracts of lands allotted them. After these deeds were delivered, the heirs of each branch took possession of the lands, cultivated them, and paid the taxes assessed on the wild lands allotted them. The respective heirs sold, released and conveyed land in pursuance of the deeds of partition; as will appear by reference to the deeds upon record.

Jacob Fox and wife having emigrated to Pennsylvania, on the 13th November 1827, they, in conjunction with Joseph Fearon and Scarrow and wife, by their attorney, Nathaniel Nunnelly, made a deed of partition, tripartite, of the lands fully allotted them by the deed of the 25th March 1825. This deed fully recognised and recited the deed and confirmed the partition then made. Thus stood *the rights of the parties in May 1828. In March 1827, the treasurer of Lycoming county, Mr. Harris, [*370 informed Mr. James Fearon, the brother of Mrs. Fox, of the sale of the tract in question, and of the necessity of its redemption; and in February 1828, about the first week, the treasurer was again in Philadelphia, and met Mr. Fox, and Nunnelly, the attorney of Scarrow and wife, and informed them fully of the situation of this tract, and advised them to redeem, and communicated to Fox, the claimant and owner of this tract, that Robert Quay, Esq., pretended to have an interest in all those lands. The reply was, "that Quay had nothing to do with them that were marked as his." Thus the facts are, up to 1828. Did Quay claim to have an estate or interest in the land, at the time of the tender; or did he claim to be an agent of the owner? The testimony is full, clear and unquestionable, that he did not affect, or pretend to have a scintilla of interest in this tract, subsequent to the delivery of the deeds of partition of 1825. He swears it expressly himself; his son, J. F. Quay, and Mr. McDonald conclusively prove it; nor is there

or can there be any allegation of agency. Thus, we have the concurrent declaration of Fox, under whom the plaintiffs below claim title, and of Quay—that Quay had no right to his land. Has the law cast upon him, by its operation, a right to the occupancy of the land, and a right of entry into this tract, of which he was ignorant? Two positions present themselves. 1. Were the deeds of 1825, making partition valid, and binding on Robert Quay and wife at this date? 2. Or did the ratification thereof, by relation of law, create a divestiture of the estate of Mrs. Scarrow, as the date of the deed of the 12th March 1825.

The deed executed by the representatives of William Fearon, among whom were Quay and wife, was perfect in all its parts; its execution was in strict compliance with the acts of the legislature of Pennsylvania, relative to the acknowledgment and probate of deeds; it contained the acknowledgment of the receipt of a full and legal consideration for its execution and delivery: and on the day it bears date, was delivered to the acknowledged and recognised agent of the parties, to whom the conveyance was made. A party cannot pronounce his own deed invalid, whatever cause be assigned for its invalidity. 1 Kent's Com. 414; *Fletcher* v. *Peck*, 6 Cranch 88. Under the facts disclosed on the record, could Quay and wife, even if they were desirous to do so, impugn the deed of March 1825? Not a solitary *371] individual, interested in the estate in 1825, or since, *ever wished to destroy or invalidate the deeds of partition. For a special object, and for a limited purpose, strangers who purchased with full notice of the title of the defendant below, now assail and endeavor to overthrow the title of the defendant; but to preserve the partition of 1825, valid as to themselves, and avoid it by destroying a link in the chain of their own title, to divest the estate of the plaintiff in error.

Could Quay and wife have recovered any part or portion of this tract of land in ejectment, since 1825? The deed then executed and delivered by them would have been a perfect estoppel to the suit. On its production, no court would have suffered a recovery to have been had in their favor. A person who is entitled, either in law or equity, to the possession or enjoyment of land, or has an estate in it, can enforce that right at law; otherwise, he would have a right without a remedy. If Quay and wife had no right which could be enforced by action, on what principle can he redeem? The provision is, "If the owner or owners of land, sold as aforesaid, shall make or cause to be made, within two years after such sale, an offer or legal tender," &c. See 4th section of the act of 1815. Throughout, the whole act speaks of the "owner or owners." The act of 1804, in the 2d section, make it the duty of the treasurer, to take from the purchaser or purchasers, bonds "for any surplus money that may remain, after satisfying and paying the taxes and costs." For whose use? For that of "the owner or owners of the land, at the time of sale, or their heirs or assigns, or their legal representatives." If this tract had been sold for several hundred dollars beyond the taxes due, and costs; and a bond had been taken from the purchaser; who would have been entitled to the money? Quay? Unquestionably not! Could he have released the bond, and discharged the purchaser from his liability to the owner? It is conceived, he could not: that a receipt by him, for payment of the money, would have been no bar to a recovery by Fox and wife, or their assigns, on the production of the evi-

dence on this record. If these positions be correct, then, *à fortiori*, he had no legal or equitable estate that would authorize her to redeem.

Now, as to Mrs. Scarrow: how was and is she situated in relation to this question? It is not her, nor any person claiming under her, that impeaches the validity of the deed of partition of the 12th March 1825. Have strangers a right to do it? or can others, contrary to her wishes. and against her consent, render null and void, *and hold *in fieri*, a partition confirmed and consummated by her? The letters of attorney, [*372 of 1811, were not acknowledged by Mrs. Scarrow, in pursuance of the directions of the act of 24th February 1770, to sell and convey lands in Pennsylvania, belonging to a *feme covert;* it was necessary to have the separate examination, &c., of the wife, and that set out in the certificate by the proper officer. This certificate constituted no part of the instrument, and is but the evidence of its execution. The instrument was perfect without it; but before a court of law could receive it in evidence, the probate must be perfect. It is immaterial, when the probate was made, whether at the date and delivery of the deed, or years subsequent thereto. When made, the deed took effect as of its date. The cases cited fully sustain these positions.

The case of *Rhoads's Estate*, 3 Rawle 420, decides the very point, that an acknowledgment by a wife is not necessary to authorize partition to be made of lands which descend under the intestate laws in Pennsylvania. I would respectfully refer your honors to this case, as the very point was made and elaborately discussed. It has become a rule of property, upon which many valuable estates depend, and will not be lightly disturbed. It is a construction given to a local statute, by the highest judicial authority of the state. In addition to this persuasive reason for adherence to the principle decided in this case, I would respectfully submit, that it is not void of support on common-law principles. By statute, those who hold land by descent, in Pennsylvania, are called "tenants in common;" but by the incidents of the tenure, they approximate to an estate of coparcenary at common law. In *Long* v. *Long*, 1 Watts 269, the supreme court of Pennsylvania clothed these estates with the incidents of coparcenary. At common law, estates of tenants in common are acquired by purchase; and livery of seisin, &c., accompanies them. Coparceners acquire title by descent, and have a unity of interest, title and possession. It is not necessary to levy a fine, or suffer a common recovery, to vest the estate of a coparcener, in partition; and the same rule is applicable to estates acquired by descent, in Pennsylvania. Partition between coparceners does not constitute a conveyance, nor does it pass the land by a fresh investiture of the seisin. It only adjusts the rights of the parceners to the possession. See Allnat on Partition, M. page 124–5; Ibid. page 21, marginal. The husband and wife are compelled, in Pennsylvania, by statute, to make partition in the orphans' court; and that which they *are compelled to do at [*373 law, they may do by agreement. Litt. § 171. Hargrave, in a note, says, the above doctrine he takes to be clear law. If the partition be unequal, it is good during the life of the husband. Even infants, if the allotment be equal, are bound by partition; so a *prochien ami* may make partition on behalf of an infant, because the separation and division of the estate is

believed to be for the advantage of the infant. See *Long* v. *Long*, 1 Watts 265–70; *Bavington* v. *Clarke*, 2 P. & W. 124; 3 Burr. 1801.

It was, at all events, binding on Mrs. Scarrow, during coverture; and as her husband is in full life, no person can avoid it. But as Mrs. Scarrow has ratified and confirmed the partition, in the lifetime of her husband, all others are estopped for ever from denying its validity. The deed was not void; it was only voidable. Cowp. 291. The estate passed to the grantees by the deed of 1825, during the lifetime of Scarrow. See *Mercer* v. *Watson*, 1 Watts 337. The alienation was good against Scarrow; and he, as *baron*, had power to transfer the estate of *feme*, subject to the right of the entry of *feme* or her heirs, on the death of the husband. 1 Preston on Abst. of Title 334–5; 2 Kent's Com. 133. 3 Serg. & Rawle, 383, 387, maintains the analogous position, as to the right of an infant; and decides that an invalid deed can only be made void by the infant. See also 10 Serg. & Rawle 117.

But it is argued, that the letters of attorney to Wilson and Curwen conferred no authority on them to make partition. If it did not, how can the plaintiff below maintain his suit for the whole tract of land for which a judgment has been rendered in his favor? He claims through and by the partition made under that power. There never was any other division of this estate between the two families of Abel and William Fearon, unless what was done by and under the letters of attorney aforesaid; and their ratification and confirmation created a partition. The estate is yet in common, and the plaintiff below could, under any aspect, only recover the moiety to which Mrs. Fox was entitled by descent. If this position of the defendant in error is true, the judgment must be reversed. The reading of the letters of attorney clearly evidence the intention of the constituents, and show the object they desired to accomplish. They authorize their attorneys "to obtain the actual seisin and possession of their respective shares." The estate was undivided between—*First, the children of William Fearon and Abel Fearon. And second, when the general division was made between the two families, the moiety allotted the Abel branch was to be divided between them. "Now, how were the attorneys to obtain the actual seisin and possession of their respective shares," without an equal partition? After they had got "the actual seisin and possession of their respective shares," they had power to sell and convey "their respective shares," and convert them into money. Again, they had power to enter into the possession, "along with, or without, the other heirs." They were to take possession of each and every of their respective parts or shares; and had power expressly given "to do all things necessary for accomplishing the several purposes aforesaid." They are sound principles, that every general power necessarily implies the grant of every matter necessary to its complete execution; and that the rule of construction is, to effectuate the intention of the parties, if such intention be consistent with law. See 4 Dall. 347; 6 Binn. 149; Sugden on Powers 459. The deposition of Fox proves that the parties contemplated a division; for he says, "we wrote letters to Mr. Wilson, to divide the land;" and it was necessary to make a partition, to enable the attorneys to accomplish the purposes designated in the power.

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Hepburn v. Dubois.

BALDWIN, Justice, delivered the opinion of the court:—This case was before this court on a writ of error taken by the plaintiff below, to the district court for the western district of Pennsylvania, at the January term 1836; and all the questions arising on the record, or made by counsel, were there fully considered. The court, however, took further time for consideration, and at the term of 1836, delivered their unanimous opinion, reversing the judgment of the district court on the merits of the case, as well on the questions of law as of fact; as will appear in 10 Pet. 17, 33. Pursuant to the judgment and mandate there rendered, the case was again tried, and now comes before us on a writ of error by the defendant below, after a verdict and judgment below against him; in the argument of which, every point of law and question of fact which came up and was decided before, has been noticed by counsel now.

As relates to the questions of law arising on the great mass of deeds in the former and present record, they are not varied by *anything which is now brought up for the first time; the want of any operative act by Mrs. Scarrow, which could confirm the alleged partition of 1825, before the duly-acknowledged deed of confirmation by her and her husband in 1832, is not supplied. The counsel of the plaintiff in error have, indeed, contended, that her deed of 1832 operates retrospectively to validate all the previous acts of her attorneys in fact, from 1811 to 1828. But the law is well settled to the contrary. The deed of a *feme covert*, conveying her interest in land which she owns in fee, does not pass her interest, by the force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity. In such cases, an acknowledgment gives no additional effect between the parties to the deed; it operates only as to third persons, under the provisions of recording and kindred laws. The law presumes a *feme covert* to act under the coercion of her husband, unless before a court of record, a judge, or some commissioner, in England, by a separate acknowledgment, out of the presence of her husband; and in these states, before some court or judicial officer, authorized to take and certify such acknowledgment. We are bound, therefore, in accordance to what we deemed, in the former case to be the legal result of all the deeds and facts on the record, to declare, that Mr. Quay had in him such legal right to the premises; on which we then held, and now deliberately hold, to be a *scintilla* of legal right; which is all that, by the laws of the state, is necessary to entitle the holder of such right to redeem lands sold for taxes. [*375

In urging upon this court a review of the parol evidence in the record, we think the counsel of the plaintiff in error have asked us to transcend the limits prescribed to our action on questions of fact, by a uniform course of decision from the first organization of this court, which has been repeatedly defined, during the present term, in our opinion; unanimous on the law, though sometimes differing in its application to particular cases. If our past course of adjudication has not sufficed to satisfy the bar, as to what we have considered our most solemn duty; and if it is yet an open question as to what is the line which the law has drawn between those questions of fact cognisable only by the jury below, and questions of law arising on the joint action of the court and jury, in that court whose record we judicially inspect on error; it will be useless to attempt to close it, by any opinion to be delivered in this case.

This court is committed, in language which it neither can nor desires to recall; because that power which we are bound to obey, has *spoken *376] to us, and all the courts in the United States, in terms most imperative. "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude; and every encroachment upon it has been watched with great jealousy." "One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution, proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, 'that in suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law.'" 3 Pet. 446.

If this court can comprehend what these rules are, or promulgate them in intelligible language, they are these:—That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer, on a demurrer to the evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error, that they look to the evidence for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case. If, in its judgment, the appellate court should hold, that the evidence was competent, then they must found their judgment on all such facts as were legally inferrible therefrom; in the same manner, and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause, must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by, the evidence.

On the evidence in the former record, we held, that it was competent, in law, to make out, and for the jury to find, the fact of an offer to refund the taxes, &c., so as to give a right of redemption: on the evidence and finding of the jury in the present record, we *are bound to consider the fact *377] of such offer as established, and to hold the facts so found, to bring the defendant in error within the provisions of the laws of Pennsylvania, on which the case turns. The judgment of the court below is, therefore, affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Pennsylvania, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

*Isaac Bradlie and John Gibbons, Plaintiffs in error, *v.* The Maryland Insurance Company.

Marine insurance.—Abandonment.—Value of ship.—Time policy. Partial loss.—Bottomry.

By the well-settled principles of law, in the United States, the state of the facts, and not the state of the information, at the time of an abandonment, constitutes the criterion by which is to be ascertained whether a total loss has occurred or not, for which an abandonment can be made. If the abandonment, when made, is good, the rights of the parties are definitively fixed, and do not become changed by any subsequent events; if, on the other hand, the abandonment, when made, is not good, subsequent circumstances will not affect it, so as retroactively to impart to it a validity which it had not at its origin.

In cases where an abandonment was founded upon a supposed technical total loss, by a damage or injury, exceeding one-half of the value of the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proof, to be derived from subsequent events; thus, if the repairs, when subsequently made, clearly exceed the half value, it is plain, that this affords one of the best proofs of the actual damage or injury; on the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. In many cases of stranding, the state of the vessel may be such, from the imminency of the peril, and the apparent cost of expenditures requisite to deliver her from it, as to justify an abandonment, although by some fortunate occurrence, she may be delivered from her peril, without an actual expenditure of one-half of her value, after she is in safety. Where, in the circumstances in which the vessel then may have been, in the highest degree of probability, the expenditures to repair her would exceed half her value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold every attempt to get the vessel off, because of such apparently great expenditure, the abandonment would doubtless be good.

In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, on the fullest consideration, been held by this court, that the true basis of the valuation is the value of the ship, at the time of the disaster; and that if, after the damage is, or might be, repaired, the ship is not, or would not be, worth, at the place of repairs, double the cost of repairs, it is to be treated as a technical total loss.[1]

The valuation in the policy, or the value at the home port, or in the general market of other ports, continues no ingredient in ascertaining whether the injury by the disaster is more than one-half of the value of the vessel, or not; for the like reason, the ordinary deduction, in case of a partial loss, of "one-third new for old," from the repairs, is equally inapplicable to cases of a technical total loss, by an injury exceeding one-half of the value of the vessel.

The mere retardation of the voyage, by any of the perils insured against, not amounting to, nor producing, a total incapacity of the ship eventually to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss, which will authorize an abandonment. A retardation for the purpose of repairing damage from the perils insured against, that damage not exceeding one moiety of the value of the ship, falls directly within this doctrine; under *such circumstances, if the ship can be repaired, and is repaired, [*379
and is thus capable of performing the voyage, there is no ground of abandonment, founded upon the consideration that the voyage may not be worth pursuing, for the interest of the ship-owner, or that the cargo has been injured so that it is not worth transporting further on the voyage; for the loss of the cargo for the voyage, has nothing to do with the insurance upon the ship for the voyage.

An insurance on time differs, as to this point, in no essential manner, from one upon a particular voyage; except in this, that in the latter case, the insurance is upon a specific voyage described in the policy; whereas, a policy on time, insures no specific voyage, but it covers any voyage or voyages whatsoever, undertaken within, and not exceeding, in point of duration, the lim-

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[1] In determining whether there has been a constructive total loss, the value of the vessel at the port of necessity is the standard. American Insurance Co. *v.* Francia, 9 Penn. St. 390. And see The Star of Hope, 9 Wall. 203, 235.

ited period for which the insurance is made. But it does not contain an undertaking, that any particular voyage shall be performed within a particular period; it warrants nothing as to any prolongation or retardation of the voyage; but only that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her, during the time for which she is insured; and of repairing it, if interrupted.

There is no principle of law which makes the underwriters liable, in the case of a merely partial loss of the ship, if money is taken up on bottomry for the necessary repairs and expenditures, and which makes it the duty of the underwriters to deliver the ship from the bottomry bond, to the extent of their liability for the expenditures; and that if they do not, and if the vessel is sold under the bottomry bond, they are liable, not only for the partial loss, but for all other losses to the owner, for their neglect.

The underwriters engage to pay the amount of the expenditures and losses directly flowing from the perils insured against; but not any remote or contingent losses to the owner, from their neglect to pay the same.

The underwriters are not bound to supply funds, in a foreign port, for the repairs of any damage to the ship occasioned by a peril insured against; they undertake only to pay the amount, after due notice and proof of the loss, and within a prescribed time.

If, to meet the expenditures for repairs, the master is compelled to take up money on bottomry, and thereby an additional premium becomes payable, that constitutes a part of the loss, for which the underwriters are liable; but in cases of partial loss, the money is not taken up on account of the underwriters, but of the owner; and they become liable for the loss, whether the bottomry bond ever becomes due and payable, or not.

In the case of a partial loss, where money is taken up on bottomry bond, to defray the expenditures for repairs, the underwriters have nothing to do with the bottomry bond; but are simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode, as a part of the loss.

Error to the Circuit Court of Maryland. The case, as stated in the opinion of the court, was as follows:

The original action was upon a policy of insurance, dated the 22d of November 1832, whereby the defendants, the Maryland Insurance Company, caused the plaintiffs, by their agents (William *Howell & Son), to be *380] insured, lost or not lost, $10,000, at a premium of four per cent., on the brig Gracchus, Snow, master (valued at that sum), at and from Baltimore, for six calendar months, commencing that day at noon; and if she be on a passage, at the expiration of the time, the risk to continue, at the same rate of premium, until her arrival at the port of destination. The declaration alleged a total loss, by the casting ashore and stranding of the brig, on the 23d of March 1833, in the river Mississippi.

Upon the trial of the cause, it appeared in evidence, that the brig sailed from Baltimore, on a voyage to New Orleans, and safely arrived there, and took on board part of her cargo (pork and sugar), at that port, on a voyage for Baltimore; and about the middle of the 23d day of March 1833, sailed from New Orleans, intending to proceed to Sheppard's plantation, on the river Mississippi, about thirty-three miles below New Orleans, to take in the residue of her cargo for the same voyage. At the English Turn, about twenty-two miles from New Orleans, the brig attempted to come at anchor, and in so doing, lost the small bower anchor; and then dropped the best bower anchor, which brought her up. The next morning, while the brig was proceeding on her voyage, she struck on a log, broke the rudder-pintles, when she fell off and went on shore. A signal was then made for a steamboat in sight, which came to the assistance of the brig, and in attempting to haul her off, the hawser parted. It was then found, that the brig was making water very fast; help was obtained from a neighboring plantation.

They commenced pumping, and discharging the cargo on board of the steamboat; and after discharging all the pork, and a part of the sugar, they succeeded in freeing the ship, on the afternoon of the same day. She was then got off, and proceeded to New Orleans, where she arrived the same night; she continuing to leak, and both pumps being kept going all the time. The next day, the master understood, that the steamboat claimed a salvage of fifty per cent., and intended to libel for it. On the 27th of the same month, the brig was taken across the river for repairs. On the same day, the brig was libelled for the salvage, in the district court of Louisiana.

On the 25th of March, Snow, the master, wrote a letter to one of the owners, containing an account of the loss and state of the brig; and also of the claim by the salvors of fifty per cent., which the underwriters on the cargo and himself had objected to; adding, that *they should hold the steamboat liable for any damage that might be incurred on account of the detention. The following is a copy of the letter. [*381

"New Orleans, 25th March 1833.

"ISAAC BRADLIE, Esq., Seaford, Delaware.

"Dear Sir:—I left here on the 23d inst., to go thirty-six miles below, to complete loading the brig with sugars, for Baltimore; on the evening of the same day, in coming to, in the English Turn, in a heavy blow from the S. E., parted the small bower cable, and lost the anchor. I then let go the best bower, which brought her up, where we lay during the night; in the morning of the 24th, got under way and proceeded down the river; at 7 A. M., struck on a log, broke the rudder-pintles, the brig fell off and went on shore. I then made a signal for a steamboat which was in sight; she came to our assistance and attempted to pull us off, but the hawser parted; we then found, that the brig was making water very fast, and that she would soon fill; got thirty odd negroes from a plantation, and commenced pumping, and discharging the cargo on board of the steamboat; after discharging all of the pork and the greater part of the sugar, we succeeded in freeing of her, at 5 P. M.; we then got her off and proceeded up to town, where we arrived at 11 P. M. The owners of the steamboat claim a salvage of fifty per cent. on vessel and cargo, which the underwriters of the cargo, with myself, have objected to: we have not been able to discharge the balance of the cargo to-day; what the consequence will be, I cannot say. We hold the owners of the steamboat liable for any damage that may occur on account of the detention; the brig continues to leak, so as to keep both pumps going almost constantly. About one-half of the sugar is damaged. I have noted a protest and had a survey, and shall proceed to have everything done in the most careful manner, as the survey may direct, for the interest of all concerned: as soon as I am able to inform you of what will be done, I will do so by the first opportunity."

On the 22d of April, Messrs. Howell & Son addressed a letter to the company, submitting the letter of the 25th of March to them, and said therein, "In consequence of the damage, together with the detention that must grow out of a lawsuit (in which it appears that the vessel is involved), the voyage being broken up, we *do hereby abandon to you the brig Gracchus, as insured in your [*382

for a total loss." On the same day, the company returned an answer, saying, "We cannot accept the abandonment tendered in your letter of this date; but expect you to do what is necessary in the case for the safety and relief of the vessel."

On the 9th of the ensuing May, the district court decreed one-quarter of the value of the vessel and cargo (estimated at $7000) as salvage; the brig being valued at $2500. On the 14th of the same month, the master got possession again of the brig, the salvage having been paid. On the 3d of June 1833, the brig was repaired and ready for a freight; and early in July, she sailed for Baltimore, with a partial cargo on board, on freight; and duly arrived there, in the latter part of the same month. The repairs at New Orleans amounted to the sum of $1690.15; and the share of the brig, at the general average or salvage, to the sum of $1245.07; in the whole amounting to $2935.22. To meet this sum, and some other expenses, the master obtained an advance from Messrs. Harrison, Brown & Co., of New Orleans, of $3715.41, and gave them as security therefor, a bottomry bond on the Gracchus, for the principal sum, and five per cent. maritime premium, payable on the safe arrival of the brig at Baltimore.

On this bottomry bond, the brig was libelled in Baltimore, and no claim being interposed by any person, she was, by a decree of the district court of Maryland, on the 5th of September 1833, ordered to be sold to satisfy the bottomry bond; and she was accordingly sold by the marshal, about the 20th of the same month, to John B. Howell, for $4750; who, on the 24th of the same month, paid to the attorney of the libellant, the full amount due under the decree of the court. On the same day, the president of the company addressed a letter to Messrs. Howell & Son, in which they say, "We have examined the statements of general and particular average, and the accounts relating thereto, which you handed us some days ago, respecting the expenses incurred on the brig Gracchus, at New Orleans. Although some of the charges are of a description fer which the company is not liable
*383] *by the terms of their policy; yet wishing to act liberally in the case, we have agreed to admit every item in the accounts, and the different amounts will be as follows." Here followed a statement, deducting from the repairs one third new for old, and admitting the sum of $2409.11 to be due to the plaintiffs, and inclosing the premium note and a check for the amount. The letter then added, "If you find any other charge, &c., has been paid at New Orleans, in order to raise the funds on bottomry, we will pay our full proportion of the same, upon being made acquainted with the amount." On the same day, Messrs. Howell & Son returned an answer, refusing to receive the premium note and check, adding, "We should do them (the owners) great injustice to make such a settlement; our opinion is, that in law and equity, they have a claim for a total loss."

These are the principal facts material to be mentioned; though much other evidence was introduced into the cause upon collateral points, by the parties. The counsel for the defendants, after the evidence on each side was closed, moved the court to instruct the jury as follows:

1. The defendants, by their counsel, pray the court to instruct the jury, that the notice of abandonment of the 22d April 1833, and the accompanying letter from Captain Snow, of the 25th of March, as given in evidence by the plaintiffs, do not show or disclose facts which in law justifies the offer to

abandon then made; and therefore, that in the absence of all evidence that said abandonment was accepted by the defendants, the plaintiffs are entitled to recover only for a partial loss.

2. That if the said notice of abandonment was sufficient, still the jury ought to find a verdict for a partial loss only; unless they shall believe from the evidence, that the Gracchus suffered damage from the accident that befel her on the 24th March 1833, to more than one-half the sum at which she was valued in the policy; and that in estimating said damage, the jury ought to take the cost of her repairs only, deducting one-third therefrom, as in the case of adjusting a partial loss.

3. That if the said abandonment was sufficient, as is assumed in the preceding prayer, still the jury ought to find a verdict for a partial loss only; unless they shall believe upon the evidence, that the damage so sustained by said brig exceeded in amount one-half the sum at which she was valued in the policy; and that in estimating the *cost of her repairs, for the purpose of ascertaining the amount of such damage, the jury are bound [*384 to deduct one-third therefrom, as in the case of a partial loss.

4. That if said abandonment was sufficient, still the jury ought to find a partial loss only, unless they shall believe, that the damage as aforesaid was more than one-half the value of the said brig, at the time the accident happened, according to the proof of such value as given in evidence and that in estimating the amount of such damage, the jury are to take the amounts of the general and particular averages, as adjusted at New Orleans, deducting one-third from the actual cost of repairs.

But the court refused to give the instructions prayed for, and gave to the jury the following instruction: "If the jury find from the evidence, that the Gracchus was so damaged by the disaster mentioned in the letter of Captain Snow, of March 25th, 1833, that she could not be got off and repaired, without an expenditure of money to an amount exceeding half her value, at the port of New Orleans, after such repairs were made, then the plaintiffs are entitled to recover for a total loss, under the abandonment made on the 22d day of April 1833; and in ascertaining the amount of such expenditure, the jury must include the sum for which the brig was liable to the salvors, according to the decree of the district court of Louisiana, stated in the evidence: but if the jury find, that the vessel could have been got off and repaired, without an expenditure of money to the amount of more than half her value; then, upon the evidence offered, the plaintiffs are not entitled to recover for a total loss, on the ground that the voyage was retarded or lost, nor on account of the arrest and detention of the vessel by the admiralty process, issued at the instance of the salvor." The defendants excepted to the refusal of the court to give the instructions prayed; and also to the opinion actually given by the court in their instructions to the jury. The plaintiffs also excepted to the same opinion given by the court.

The plaintiffs also prayed "the court to direct the jury, that in this cause, the insured, by their letter of the 22d April, authorized and required the proper expenditures to be made upon the vessel, for which said underwriters are liable under their policy; that no funds being supplied by them in New Orleans to meet this loss; and the salvage and repairs having been paid for by money raised upon *respondentia* upon the vessel; if the jury

shall find that said vessel, under the lien of this bond, came to Baltimore,
*385] and the defendants *were then apprised of the existence of such *respondentia*, and were also informed of the existence of the proceedings thereupon against said vessel, and they neglected to pay so much thereof as they ought to have paid to relieve said vessel, and omitted to place her in the hands of the owners, discharged of so much of such bottomry as the underwriters were liable for, and in consequence thereof, said vessel was libelled and condemned and sold, and thereby wholly lost to the plaintiffs; then the plaintiffs are entitled to recover for the whole value of the vessel." The court refused to give this instruction, and the plaintiffs excepted to the refusal; and the court signed a bill of exceptions upon both exceptions.

*386] *The jury found a verdict for the plaintiffs for a partial loss, assessing the damages at $3489.22, upon which the court gave a judgment: on this judgment the plaintiffs entered a credit for $485.22, the amount of the premium note and interest. The plaintiffs prosecuted this writ of error.

The case was argued by *Johnson*, for the plaintiffs in error; and by *Meredith* and *Stewart*, for the defendants.

Johnson contended, that the judgment of the circuit court should be reversed, on the following grounds: 1st. That, under the circumstances of the case, the loss of the voyage in which the Gracchus was engaged, by the peril she sustained, entitled the plaintiffs to recover for a total loss. 2d. That the claim for salvage, and the arrest and detention of the brig consequent thereon, entitled plaintiffs to recover for such loss. 3d. That the court erred in not granting the prayer in plaintiffs' second exception.

It is assumed, that the abandonment was sufficient. The defendants objected to its form; that no cause, or a sufficient cause for it, was not assigned; but the court decided against these objections.

The instructions of the court, by which the jury where authorized to allow, in the estimate of the loss, one-third of the cost of the new for old, were altogether erroneous. The plaintiffs claimed for a technical total loss, on the state of things at the time of the abandonment. The validity of such a claim cannot be denied, if, at that time, the state of the facts was such as to justify the abandonment. This was, in truth, such as to induce
*387] the plaintiffs to consider a total loss *as inevitable. The letter of Captain Snow, of 25th March, upon which the abandonment was made on the 22d of April 1833, showed that the salvors were about to proceed against the vessel; and stated, that they claimed fifty per cent. as their salvage. In 3 Kent's Com. 308, the authorities on the subject of abandonment are summed up.

The value of the vessel was $10,000; for this sum she was insured. The whole sum received for her was but about $4000. This is the best evidence of the character of the loss sustained by the assured.

What was the situation of the vessel, from all the information which had been received, on the 23d of April 1833, when she was abandoned? Was there not imminent danger of actual total loss—attached for salvage, and fifty per cent. claimed; and the voyage broken up and destroyed? The instructions of the court, that the actual amount of salvage ultimately paid, was to furnish the rule to estimate the loss, were erroneous. The probable

loss, at the time of the abandonment, is to fix the rule for abandonment. In this, the law of insurance in this country, and in England, differ. The loss of the voyage, by the happening of one of the perils insured against, was a good foundation for abandonment, and for a recovery for a total loss. The vessel was on her home-voyage from New Orleans; and was obliged to return to New Orleans, by reason of the accident, and the course of the salvors. The voyage was thus broken up. The libel for salvage, and the detention of the vessel for repairs, were destructive of the voyage.

The voyage insured terminated on the 22d of May; and all the injury to the vessel, and the detention consequent to it, were within the period of her protection by the insurance. Had the fifty per cent. claimed by the salvors, been paid, no doubt of a technical total loss would have existed; but the master remained at New Orleans, as it was his duty, and to which he was bound by his obligations to the underwriters, to contest this claim; and this detention kept the vessel beyond the six months covered by the policy. Thus, the detention was within the policy. Cited, 3 Kent's Com. 308; 11 Johns. 293; 2 Stark. 571.

The insurance having been on time, makes no difference in estimating her loss. It was an insurance of the vessel, on her voyage, and during the time; and a guarantee that the vessel should have the physical ability, during that time, to continue the voyage. *The detention of the vessel, after the accident, gave a full and legal right to abandon. The detention was one of the sea risks insured against, and all legal detentions were within the policy. [*388

It is also contended, that the underwriters were bound to pay the bottomry bond executed at New Orleans, for the repairs of the vessel, the salvage, and the expenses. The underwriters were certainly liable to pay the whole of these charges; and by neglecting to do so, the vessel has been sold and taken from her owners. Thus a total loss has resulted. It is admitted, that a detention of a vessel insured, by admiralty process, is not a cause of abandonment, when such detention is for some cause not coming within any of the risks of the policy; but in this case, the detention was on account of one of the perils insured against. Thus, the loss of the voyage has resulted from one of the perils insured against.

Stewart and *Meredith*, for the defendants, denied that there was any error in the instructions of the circuit court. Insurance is a contract for indemnity; and this contract is fully carried out by the verdict of the jury. The jury have given the plaintiffs all they paid as salvage, and all the costs and expenses of the repairs consequent to the injury sustained by the vessel. But it is contended by the plaintiffs, that the adventure in which the vessel is engaged, the voyage, and its results, upon which the vessel is proceeding, is a part of the contract for protection by the underwriters. This is not the nature of insurance; the underwriters are only lable for the perils insured.

Assuming the principle to be, in the United States, that underwriters are liable for the state of the loss, at the time of the abandonment, there was no ground for the abandonment, when the letter from Captain Snow was received. The circumstances stated in that letter do not warrant the allegation that technical total loss had occurred. The vessel had suffered

injury; she had been rescued from greater loss by the steamboat; she had been carried to New Orleans, and fifty per cent. was claimed as salvage; but the justice of this claim was denied, and it was to be contested. With this letter, the insured and the underwriters were in possession of all the facts, and the claim of fifty per cent. as salvage, must have been seen to be unreasonable and unjust. It exceeded the usual charge for the use of a
*389] steamboat on the Mississippi, which *was known to be at the rate of ten dollars per day. There was not, then, a probability, that a technical total loss existed at that time; and subsequent circumstances showed that no loss, for which the assurers were liable, had occurred, to the extent of fifty per cent. on the value of the vessel. If the appearance of events, when the letter from Captain Snow was received, authorized the expectation that the loss would amount to fifty per cent., the underwriters have a right to look at subsequent circumstances, to decide what was the real condition of the vessel at that time.

The court will find, by a reference to the whole of the facts in the case, there was no foundation for the claim for a technical total loss. No damage had been sustained, which would support such a claim. The whole cost of the repairs of the vessel, and the amount of salvage allowed by the court, amounted together to $2935. The orders for insurance show that the Gracchus was valued at $10,000 or $12,000. At New Orleans, the Gracchus was worth $8500. The master was offered that sum for her; and he said he would take $9000. Thus, she was worth at New Orleans and at Baltimore, nearly the same sum, and there was no approximation to half of her value by the actual loss.

To proceed to the points made for the defendants in the circuit court. The court instructed the jury on the points submitted by the defendants. "If the jury find from the evidence, that the Gracchus was so damaged by the disaster mentioned in the letter of Captain Snow, of March 25th, 1833, that she could not be got off and repaired, without an expenditure of money to an amount exceeding half her value, at the port of New Orleans, after such repairs were made; then the plaintiffs are entitled to recover for a total loss, under the abandonment made on the 22d day of April 1833; and in ascertaining the amount of such expenditure, the jury must include the sum for which the brig was liable to the salvors, according to the decree of the district court of Louisiana, stated in the evidence; but if the jury find that the vessel could have been got off and repaired, without an expenditure of money to the amount of more than half her value, then, upon the evidence offered, the plaintiffs are not entitled to recover for a total loss, on the
*390] ground that the voyage was retarded or *lost, nor on account of the arrest and detention of the vessel by the admiralty process issued at the instance of the salvors."

The question was, whether the amount of repairs, and the salvage was half the value of the vessel at New Orleans, giving the assured the benefit in the estimate of the amount of the salvage. Is this an open question in this court? The policy expired on the 22d of May 1833. How far is this point settled in the case of *Alexander* v. *Baltimore Insurance Company*, 4 Cranch 370? In that case, Mr. Chief Justice MARSHALL says, that it has been decided, that the state of the fact must concur with the information, to make the abandonment for a technical total loss effectual. Cited also,

Ambl. 214; Willes 641, 644. As to how this question has been considered in England; cited, 2 Maule & Selw. 240, 247; Ibid. 278, 286, 290, 293; 4 Ibid. 393; 5 Ibid. 47; *Goss* v. *Withers*, 2 Burr. 687; *Hamilton* v. *Mendes*, Ibid. 1212.

The perils in the policy do not include the loss now set up by the plaintiffs; and there is no express assumption to insure against the kind of detention for which the loss is now claimed. It must be derived from implication, and must be a consequence of the contract between the parties to the policy of insurance. There was no evidence in the case, that the underwriters had been called upon to pay the bottomry bond, and prevent the sale of the vessel; nor was any demand made on the underwriters, to pay for the repairs of the vessel. The assured claimed a total loss, and did not proceed as if they held the underwriters liable to anything but the whole amount of the policy. Cited, *Da Costa* v. *Newnham*, 2 T. R. 407; 2 Barn. & Ald. 513; 3 Mason 429.

It is denied, that the assured have a right to abandon as for a total loss, upon a mere probability of a loss which will exceed fifty per cent. This view of the rights of the assured rests only on the suggestion of Lord Ellenborough. There must be a certain subsisting loss, when the abandonment is made, exceeding fifty per cent.

It is not admitted, that the right to abandon for breaking up of a voyage applies to an insurance on time. Hughes on Insurance, 300, 311, 314; Smith on Mercantile Law (17 Law Library), 143. The insurance on time is, that the vessel shall be able to proceed on the voyage, during the time, and to pay the damage she may sustain during that time. It is no contract for the voyage, nor against interruptions which rest upon it, other than such as are within the *perils insured against. 1 Johns. Cas. 293–4; 5 Serg. & Rawle 501; 2 Taunt. 362. This voyage was not broken [*391 up or defeated: and the jury have found, that the injury sustained by the vessel did not amount to fifty per cent. of her value. The finding of the jury is conclusive on this matter.

The arrest and detention of the vessel by admiralty process for the salvage, did not furnish grounds for the abandonment. The vessel remained in the possession of the master. It was a mere obstruction of the voyage, or a detention of the vessel, which might have been removed, and for which the master was bound to relieve her. He had, as has been stated, the means to do this; there was no evidence to show that he made any attempt to do so. Cited, 2 W. C. C. 331; 3 Kent's Com. 304. There is no special clause in the policy which includes the loss, and it must then come within that which proceeds against perils of the sea. But, by no reasoning, can the loss be made to amount to fifty per cent. from perils of the sea. Cited, 5 Maule & Selw. 434; 3 Mason 437; 21 Eng. Com. Law 41.

Story, Justice, delivered the opinion of the court.—This cause comes before the court upon a writ of error to the circuit court of Maryland district. The original action was upon a policy of insurance, dated the 22d of November 1832, whereby the defendants, the Maryland Insurance Company, caused the plaintiffs, by their agents (William Howell & Son), to be insured, lost or not lost, $10,000, at a premium of four per cent., on the brig Gracchus, Snow, master (valued at that sum), at and from Baltimore,

for six calendar months, commencing that day at noon ; and if she be on a passage, at the expiration of the time, the risk to continue, at the same rate of premium, until her arrival at the port of destination. The declaration alleged a total loss, by the casting ashore and stranding of the brig, on the 23d of March 1833, in the river Mississippi. Upon the trial of the cause, it appeared in evidence, that the brig sailed from Baltimore, on a voyage to New Orleans, and safely arrived there ; and took on board part of her cargo (pork and sugar), at that port, on a voyage for Baltimore ; and about the middle of the 23d day of March 1833, sailed from New Orleans, intending to proceed to Sheppard's plantation, on the river Mississippi, about thirty-three miles below Orleans, to take in the residue of her *cargo for the same voyage. At the English Turn, about twenty-two miles from New Orleans, the brig attempted to come to anchor, and in so doing, lost the small bower anchor ; and then dropped the best bower anchor, which brought her up. The next morning, while the brig was proceeding on her voyage, she struck on a log, broke the rudder-pintles, when she fell off and went on shore. A signal was then made for a steamboat in sight ; which came to the assistance of the brig, and in attempting to haul her off, the hawser parted. It was then found, that the brig was making water very fast ; help was obtained from a neighboring plantation ; they commenced pumping, and discharging the cargo on board of the steamboat ; and after discharging all the pork, and a part of the sugar, they succeeded in freeing the ship, on the afternoon of the same day. She was then got off, and proceeded to New Orleans, where she arrived the same night ; she continuing to leak, and both pumps being kept going all the time. The next day, the master understood that the steamboat claimed a salvage of fifty per cent., and intended to libel for it. On the 27th of the same month, the brig was taken across the river for repairs. On the same day, the brig was libelled for the salvage in the district court of Louisiana.

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On the 25th of March, Snow, the master, wrote a letter to one of the owners, containing an account of the loss and state of the brig ; and also of the claim of the salvors of fifty per cent., which the underwriters on the cargo and himself had objected to, adding that they should hold the steamboat liable for any damage that might be incurred on account of the detention. On the 22d of April, Messrs. Howell & Sons addressed a letter to the company, submitting the letter of the 25th of March to the company, and say therein : "In consequence of the damage, together with the detention that must grow out of a lawsuit (in which it appears that the vessel is involved), the voyage being broken up ; we do hereby abandon to you the brig Gracchus, as insured in your office, per policy No. 13,703, and claim for a total loss." On the same day the company returned an answer, saying : "We cannot accept the abandonment tendered in your letter of this date ; but expect you to do what is necessary in the case, for the safety and relief of the vessel."

On the 9th of ensuing May, the district court decreed one-quarter of the value of the vessel and cargo (estimated at $7000) as salvage ; the brig being valued at $2500. *On the 14th of the same month, the master got possession again of the brig, the salvage having been paid. On the 3d of June 1833, the brig was repaired and ready for a freight ; and early in July, she sailed for Baltimore, with a partial cargo on board on

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freight; and duly arrived there, in the latter part of the same month. The repairs at New Orleans amounted to the sum of $1690.15; and the share of the brig, for the general average or salvage, to the sum of $1245.07; in the whole amounting to $2935.22. To meet this sum, and some other expenses, the master obtained an advance from Messrs. Harrison, Brown & Co., of New Orleans, of $3715.41; and gave them as security therefor, a bottomry bond on the Gracchus, for the principal sum, and five per cent. maritime premium, payable on the safe arrival of the briff at Baltimore. On this bottomry bond, the brig was libelled in Baltimore; and no claim being interposed by any person, she was, by a decree of the district court of Maryland, on the 5th of September 1833, ordered to be sold, to satisfy the bottomry bond; and she was accordingly sold by the marshal, about the 20th of the same month, to John B. Howell, for $4750; and on the 24th of the same month, there was paid to the attorney of the libellant, the full amount due under the decree of the court. On the same day, the president of the company addressed a letter to Messrs. Howell & Son, in which they say, "We have examined the statements of general and particular average, and the accounts relating thereto, which you handed us some days ago respecting the expenses incurred on the brig Gracchus, at New Orleans. Although some of the charges are of a description for which the company is not liable by the terms of their policy; yet, wishing to act liberally in the case, we have agreed to admit every item in the accounts, and the different amounts will be as follows." Here follows a statement, deducting from the repairs one-third new for old, and admitting the sum of $2409.11 to be due to the plaintiffs; and inclosing the premium note, and a check for the amount. The letter then adds, "If you find any other charge, &c., has been paid at New Orleans, in order to raise the funds on bottomry, we will pay our full proportion of the same, upon being made acquainted with the amount." On the same day, Messrs. Howell & Son *returned an answer, refusing to receive the premium note and check, adding, [*394 "We should do them (the owners) great injustice to make such a settlement. Our opinion is, that in law and equity, they have a claim for a total loss." These are the principal facts material to be mentioned, though much other evidence was introduced into the cause, upon collaterial points, by the parties.

The counsel for the defendants, after the evidence on each side was closed, moved the court to instruct the jury as follows: 1. The defendants, by their counsel, pray the court to instruct the jury, that the notice of abandonment of the 22d April 1833, and the accompanying letter from Captain Snow, of the 25th of March, as given in evidence by the plaintiffs, do not show or disclose facts which in law justify the offer to abandon then made; and therefore, that in the absence of all evidence that said abandonment was accepted by the defendants, the plaintiffs are entitled to recover only for a partial loss. 2. That if the said notice of abandoment was sufficient, still the jury ought to find a verdict for a partial loss only; unless they shall believe from the evidence, that the Gracchus suffered damage from the accident that befell her on the 24th March 1833, to more than one-half the sum at which she was valued in the policy; and that in estimating said damage, the jury ought to take the cost of her repairs only, deducting

one-third therefrom, as in the case of adjusting a partial loss. 3. That if the said abandonment was sufficient, as is assumed in the preceding prayer, still the jury ought to find a verdict for a partial loss only; unless they shall believe, upon the evidence, that the damage so sustained by said brig exceeded in amount one-half the sum at which she was valued in the policy; and that in estimating the cost of her repairs for the purpose of ascertaining the amount of such damage, the jury are bound to deduct one-third therefrom, as in the case of a partial loss. 4. That if said abandonment was sufficient, still the jury ought to find a partial loss only; unless they shall believe that the damage as aforesaid was more than one-half the value of the said brig, at the time the accident happened, according to the proof of such value, as given in evidence; and that in estimating the amount of such damage, the jury are to take the amounts of the general and particular averages *as adjusted at New Orleans; deducting one-third from the actual cost of repairs.

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But the court refused to give the instruction prayed for, and gave to the jury the following instruction: "If the jury find from the evidence, that the Gracchus was so damaged by the disaster mentioned in the letter of Captain Snow, of March 25th, 1833, that she could not be got off and repaired, without an expenditure of money to an amount exceeding half her value, at the port of New Orleans, after such repairs were made; then the plaintiffs are entitled to recover for a total loss, under the abandonment made on the 22d day of April 1833; and in ascertaining the amount of such expenditure, the jury must include the sum for which the brig was liable to the salvors, according to the decree of the district court of Louisiana stated in the evidence. But if the jury find, that the vessel could have been got off and repaired, without an expenditure of money to the amount of more than half her value, then upon the evidence offered, the plaintiffs are not entitled to recover for a total loss, on the ground that the voyage was retarded or lost; nor on account of the arrest and detention of the vessel by the admiralty process, issued at the instance of the salvors." The defendants excepted to the refusal of the court to give the instructions prayed; and also to the opinion actually given by the court in their instructions to the jury. The plaintiffs also excepted to the same opinion, given by the court.

The plaintiffs also prayed "the court to direct the jury, that in this cause the assured, by their letter of the 22d April, authorized and required the proper expenditures to be made upon the vessel, for which said underwriters are liable under their policy; that no funds being supplied by them in New Orleans, to meet this loss, and the salvage and repairs having been paid for by money raised upon *respondentia* upon the vessel; if the jury shall find that said vessel, under the lien of this bond, came to Baltimore, and the defendants were then apprised of the existence of such *respondentia*, and were also informed of the existence of the proceeding thereupon against said vessel, and they neglected to pay so much thereof as they ought to have paid to relieve said vessel; and omitted to place her in the hands of the owners, discharged of so much of such bottomry as the underwriters were liable for; and in consequence thereof, said vessel was libelled and condemned and sold, and thereby wholly lost to the *plaintiffs; then the plaintiffs are entitled to recover for the whole value of the vessel."

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The court refused to give this instruction, and the plaintiffs excepted to the refusal; and the court signed a bill of exceptions upon both exceptions.

The jury found a verdict for the plaintiffs for $3489.22; upon which judgment passed for the plaintiffs. And the present writ of error is brought by the plaintiffs, for the purpose of reviewing the instructions above stated, so far as they excepted thereto.

Although the prayers for the instructions by the defendants are not before the court for the purpose of direct consideration, as the defendants have brought no writ of error; yet it is impossible completely to understand the nature and extent, and proper construction of the opinion given by the court, without adverting to the propositions contained in them; for to them and to them only was the opinion of the court given as a response. The second instruction asked by the defendants, in substance, insisted, that to entitle the plaintiffs to recover for a total loss, the damage to the Gracchus from the accident should be more than one-half the sum at which she was valued in the policy; and that in estimating that damage, the costs of the repairs only were to be taken, deducting one-third new for old. In effect, therefore, it excluded all consideration of the salvage in the ascertainment of the loss. The third instruction was, in substance, similar to the second, except that it did not insist upon the exclusion of the salvage. In effect, therefore, it insisted upon the valuation in the policy, as the standard by which to ascertain, whether the damage was half the value of the Gracchus, or not. The fourth instruction insisted, that to entitle the plaintiffs to recover for a total loss, the damage must exceed one-half the value of the Gracchus, at the time of the accident; and that in estimating the damage, the general and particular averages, as adjusted at New Orleans, were to be taken, deducting one-third new for old. In effect, therefore, it insisted, that nothing but these adjustments were to be taken into consideration, in ascertaining the totality of the loss at the time of the abandonment (admitting the abandonment to be sufficient), however imminent might be the dangers, or great the losses then actually impending over the Gracchus. And all three of these prayers further insisted, that the deduction of one-third new for old, should be made from the amount of the repairs, as in the case of a *partial loss, in ascertaining whether there was a right to abandon for a total loss, upon the ground, that the damage exceeded a moiety of the value of the vessel. [*397

The instructions of the court actually given in these prayers, involve the following propositions. 1. That if the expenditures in repairing the damage exceeded half the value of the brig at the port of New Orleans, after such repairs were made, including therein the salvage awarded to the salvors, the plaintiffs were entitled to recover for a total loss, under the abandonment made on the 22d of April 1833. 2. If the expenditures to get off and repair the brig were less than the half of such value, then the plaintiffs were not entitled to recover for a total loss, upon the ground that the voyage was retarded or lost; nor on account of the arrest and detention of the brig, under the admiralty process, for the salvage.

The question is, whether these instructions were correct. In considering the first, it is material to remark, that by the well-settled principles of our law, the state of the facts, and not the state of the information, at the time of the abandonment, constitutes the true criterion, by which we are to

ascertain, whether a total loss has occurred, or not, for which an abandonment can be made. If the abandonment, when made, is good, the rights of the parties are definitively fixed, and do not become changed by any subsequent events. If, on the other hand, the abandonment, when made, is not good, subsequent circumstances will not affect it, so as, retroactively, to impart to it a validity, which it had not at its origin. In some respects, our law on this point differs from that of England; for, by the latter, the right to a total loss, vested by an abandonment, may be divested by subsequent events, which change that total loss into a partial loss. It is unnecessary to cite cases on this subject, as the diversity is well known; and the courts in neither country have shown any disposition of late years to recede from their own doctrine. The cases of *Rhinelander* v. *Insurance Company of Pennsylvania*, 4 Cranch 29, and *Marshall* v. *Delaware Insurance Company*, Ibid. 202, are direct affirmations of our rule; and those of *Bainbridge* v. *Nielson*, 10 East 329, *Patterson* v. *Ritchie*, 4 M. & Selw. 394 and *McIver* v. *Henderson*, Ibid. 584, of the English rule.

In cases where the abandonment is founded upon a supposed technical total loss, by a damage or injury exceeding one-half the value of the vessel, *398] although the fact of such damage or injury must exist *at the time, yet it is necessarily open to proofs, to be derived from subsequent events. Thus, for example, if the repairs, when subsequently made, clearly exceed the half value, it is plain, that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. But it is not, and in many cases it cannot be decisive of the right to abandon. In many cases of stranding, the state of the vessel, at the time, may be such, from the imminency of the peril, and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril, without an actual expenditure of one-half of her value, after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril, are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good. It was to such a case, that Lord Ellenborough alluded, in *Anderson* v. *Wallis*, 2 Maule & Selw. 240, when he said: "There is not any case, or principle, which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of the abandonment." Mr. Chancellor Kent, in his learned Commentaries (vol. 3, p. 321), has laid down the true results of the doctrine of law on this subject. "The right of abandonment (says he) does not depend upon the certainty, but upon the high probability of a total loss, either of the property, or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon; though it should happen, that she was afterwards recovered at a less expense." We have no difficulty, therefore, in acceding to the argument of the counsel for

the plaintiffs in error on this point. But its application to the ruling of the court will be considered hereafter.

In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this court, that the true basis of the valuation is the value of the ship, at the time of the *disaster; and that if, after the damage is or might be repaired, the ship is not, or [*399 would not, be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss. This was the doctrine asserted in the *Patapsco Insurance Company* v. *Southgate*, 5 Pet. 604; in which the court below had instructed the jury, that, if the vessel could not have been repaired, without an expenditure exceeding half her value, at the port of the repairs, after the repairs were made, it coustituted a total loss. This court held that instruction to be entirely correct. It follows, from this doctrine, that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel, or not. For the like reason, the ordinary deduction, in cases of a partial loss, of one-third new for old from the repairs, is equally inapplicable to cases of a technical total loss, by an injury exceeding one-half on the value of the vessel. That rule supposes the vessel to be repaired and returned to the owner, who receives a correspondent benefit from the repairs, beyond his loss, to the amount of the one-third. But in the case of a total loss, the owner receives no such benefit; the vessel never returns to him, but is transferred to the underwriters. If the actual cost of the repairs exceeds one-half of her value, after the repairs are made, then the case falls directly within the predicament of the doctrine asserted in the case in 5 Pet. 604. The same limitations of the rule, and the reasons of it, are very accurately laid down by Mr. Chancellor Kent, in his Commentaries (3 vol. p. 330), and in *Da Costa* v. *Newnham*, 2 T. R. 407.

If, with these principles in view, we examine the first instruction given in this case in the circuit court, it will be found to be perfectly correct. Indeed, that part of the instruction which declares, that if the brig "could not be got off and repaired, without an expenditure of money, to an amount exceeding half her value at the port of New Orleans, after such repairs were made, then the plaintiffs are entitled to recover for a total loss, under the abandonment," is precisely in the terms of the instruction given in the *Patapsco Insurance Company* v. *Southgate*, 5 Pet. 604. The error which has been insisted on at the argument by the plaintiffs, is in the additional direction—that "in ascertaining the amount of such expenditure, the jury must include the sum for which the brig was liable to the salvors, according to the decree of the district court of Louisiana, stated in *the evidence;" which, it is contended, removed from the consideration of [*400 the jury the right to take into the account the high probability, at the time of the abandonment, of the allowance of a greater salvage, and even to the extent of the fifty per cent. then claimed by the salvors. And in support of the argument, it is insisted, that the state of the facts, and the high probabilities, at the time of the abandonment, constitute the governing rule, and not the ultimate result in the subsequent events. But it appears to us, that the argument is founded upon a total misunderstanding of the true

import of this part of the instruction. The court did not undertake to say, and did not say, that the jury might not properly take into consideration the high probability of a larger salvage at the time of the abandonment; but simply, that the jury must include in the half value, the amount of the actual salvage decreed, because that was, in truth, a part of the loss. The instruction was, therefore, not a limitation, restrictive of the rights and claims of the plaintiffs, but, in fact, a direction in favor of their rights and claims, and in support of the abandonment. This is demonstrated by the then actual position of the cause. The defendants had asked an instruction, that the costs of the repairs only, exclusive of the salvage, should be taken into consideration, in estimating the half value; and also, that the one-third new for old, should be deducted from the amount of the cost, in estimating the half value. The court, in effect, negatived both instructions; and in the particulars now objected to, there was a positive direction to the jury, not to exclude, but to include, the salvage, in the estimate of the loss. In this view of the matter, the instruction was most favorable to the plaintiffs; and so far from excluding evidence, which might show the amount of the actual damage, at the time of the abandonment, it resorted, and very properly resorted, to the subsequent ascertainment of salvage, as positive evidence, that to that extent at least, the actual damage was enhanced beyond the cost of the repairs. We are entirely satisfied with this part of the instruction, in this view, which seems to us to be the true interpretation of it.

In respect to the other part of the instruction there is no substantial difficulty. The mere retardation of the voyage by any of the perils insured against, not amounting to, nor producing, a total incapacity of the ship eventually to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss, which will authorize an abandonment. A retardation for the purpose of repairing damages from the perils insured
*401] against, that *damage not exceeding one moiety of the value of the ship, falls directly within this doctrine. Under such circumstances, if the ship can be repaired, and is repaired, and is thus capable of performing the voyage, there is no ground of abandonment, founded upon the consideration, that the voyage may not be worth pursuing, for the interest of the ship-owner, or that the cargo has been injured, so that it is not worth transporting further on the voyage; for the loss of the cargo for the voyage has nothing to do with an insurance upon the ship for the voyage. This was expressly held by this court, in the case of *Alexander* v. *Baltimore Insurance Company*, 4 Cranch 370; where it was decided, that an insurance on a ship for a voyage, was not to be treated as an insurance on the ship and the voyage, or as an undertaking that she shall actually perform the voyage; but only, that notwithstanding any of the perils insured against, she shall be of ability to perform the voyage; and that the underwriters will pay any damage sustained by her, from those perils, during the voyage. The court further held, that upon such an insurance, a total loss of the cargo for the voyage, was not a total loss of the ship for the voyage. In respect to the point of retardation for repairs, the more recent authorities contain reasoning altogether satisfactory, and consistent with the true nature and objects of policies of insurance. The subject was a good deal discussed in the case of *Anderson* v. *Wallis*, 2 Maule & Selw. 240, which was a policy on cargo; and again in *Everth* v. *Smith*, Ibid. 278, which was a policy on freight; and

again in *Falkner* v. *Ritchie*, Ibid. 290, which was a policy on ship ; and in each of the cases, the court came to the conclusion, that a mere retardation of the voyage, by any peril insured against, did not entitle the assured to recover for a total loss, if the thing insured was capable of performing the voyage. Lord ELLENBOROUGH, in the first case, said : "Disappointment of arrival is a new head of abandonment in insurance law." "If the retardation of the voyage be a cause of abandonment, the happening of any marine peril to the ship, by which a delay is caused in her arrival at the earliest market, would also be a cause of abandonment. I am well aware, that an insurance upon a cargo, for a particular voyage, contemplates that the voyage shall be performed with that cargo ; and any risk, which renders the cargo permanently lost to the assured, may be a cause of abandonment. In like manner, a total loss of cargo may be effected, not merely by the destination of that cargo, but by a permanent incapacity of the ship *to perform the voyage ; that is, a destruction of the contemplated adventure. But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing this burden on the underwriters." In *Falkner* v. *Ritchie*, 2 Maule & Selw. 290, his lordship added : "What has a loss of the voyage to do with a loss of the ship ?" meaning, as the context shows, that the loss of the voyage is no ground of abandonment, where the ship is not damaged to an extent which permanently disables her to perform it. The same doctrine was affirmed in *Hunt* v. *Royal Exchange Assurance Company*, 5 Maule & Selw. 47 ; and in *Naylor* v. *Taylor*, 9 Barn. & Cres. 718. And it was long ago recognised by this court, by necessary implication, in the case of *Alexander* v. *Baltimore Insurance Company*, 4 Cranch 370, and *Smith* v. *Universal Insurance Company*, 6 Wheat. 176. In this latter case, the court said : "The insurers do not undertake, that the voyage shall be performed without delay, or that the perils insured against shall not occur. They undertake only for losses sustained by those perils ; and if any peril does act upon the subject, yet, if it be removed before any loss takes place, and the voyage be not thereby broken up, but is, or may be, resumed, the assured cannot abandon for a total loss." Language more explicit upon this point could scarcely have been used. [*402

Nor is there any, the slightest, difference in law, whether the retardation or temporary suspension of the voyage be for the purpose of repairs, or to meet any other exigency, which interrupts, but does not finally defeat, the actual resumption of it. The detention of the ship, under the admiralty proceedings, does not, therefore, in any manner change the posture of the case. It is admitted on all sides, and indeed, it admits of no legal controversy, that this detention cannot be construed to be a substantive peril, within the clause of the policy respecting "restraints and detainments of all kings, princes or people ;" for the restraints and detainments there alluded to, are the operations of the sovereign power by an exercise of the *vis major*, in its sovereign capacity, controlling or divesting, for the time, the dominion or authority of the owner over the ship ; and not proceedings of a mere civil nature, to enforce private rights, claimed, under the owner, for services actually rendered in the preservation of his property. This, indeed, if it admitted of any doubt, would be disposed of by the reasoning of the court in *Nesbitt* v. *Lushington*, 4 T. R. 783, and *Thornely* v. *Hebson*, 2 Barn.

& Ad. 513. (See *also, 3 Kent's Com. 304, 326.) In truth, the detention by the admiralty process was, in this case, as is apparent from the admitted facts, a mere retardation of the voyage. The brig was delivered from that proceeding; the salvage was paid; and she not only was capable, but did, in fact, resume and complete her voyage to Baltimore.

The considerations already suggested dispose of the other point raised under this instruction, as to the loss of the voyage. It is apparent, that the loss of the voyage spoken of, and necessarily implied, in this instruction, upon the admitted state of the facts, was the loss of the cargo for the voyage, and not the loss of the vessel, by incapacity to perform the voyage. If the vessel could, as the instruction supposes, be got off and repaired, without an expenditure exceeding half her value, and be thereby enabled to resume her voyage, it is plain, that the loss of the cargo for that voyage constituted no total loss of the vessel for the voyage. It was absolutely impossible for the court, upon the authorities already cited, to arrive at any other conclusion.

The state of things, at the time of the abandonment, did not demonstrate any incapacity of the ship to resume her voyage, after the repairs; and in point of fact, as has been already suggested, she not only did resume it, but actually performed it. The insurance was upon time, and the policy actually expired, by its own limitation, upon the 22d of May 1833, before she had actually resumed her voyage. But that can make no difference. An insurance on time differs, as to this point, in no essential manner whatsoever, from an insurance upon a particular voyage, except in this, that in the latter case, the insurance is upon and for a specific voyage described in the policy; whereas, a policy on time insures no specific voyage, but it covers any voyage or voyages whatsoever, undertaken within, and not exceeding in point of duration, the limited period for which the insurance is made. But an insurance on time by no means contains any undertaking on the part of the underwriters, that any particular voyage undertaken by the assured, within the prescribed period, shall be performed before the expiration of the policy. It warrants nothing as to any retardation or prolongation of the voyage; but only, that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her, during the time for which she is insured; and of resuming it, if interrupted. In other words, the undertaking is, that the ship shall not, by the operation of any peril insured against, during the time
*404] *for which the policy continues, be totally and permanently lost, or disabled from performing the voyage then in progress, or any other voyage within the scope of the policy. The case of *Pole* v. *Fitzgerald*, Willes 641, s. c. Ambl. 214, affords a stiking illustration of this doctrine; and whatever doubts may be entertained as to some of the *dicta* in that case, Lord Ellenborough has well said, that it may be of great use to resort to it, in order to purify the mind from these generalities respecting the loss of the voyage of the ship constituting, *per se*, a loss of the ship. *Falkner* v. *Ritchie*, 2 Maule & Selw. 293. There is no error, then, in the instructions actually given to the jury, in the response of the court to those asked by the defendants.

In the next place, as to the instruction asked by the plaintiffs, and

refused by the court. In substance, it insisted, that if the underwriters had authorized the expenditures to be made for the repairs, and had not supplied the appropriate funds for these repairs, and for the salvage, and the bottomry bond was given to secure them, and the underwriters were apprised of the admiralty proceedings at Baltimore, and there neglected to pay so much thereof, as they ought to have paid to discharge the same, and that the vessel, in consequence thereof, was sold under those proceedings, then the plaintiffs were entitled to recover for the whole value of the vessel. This instruction, it may be remarked, proceeds upon the supposition, that there was not a technical total loss, entitling the plaintiffs to abandon ; and that the abandonment of the 22d of April was not available for the plaintiffs. For, if it had been, then the underwriters would have become, from that time, the owners of the ship ; and the subsequent losses, whatever they might be, would be on their sole account. The case put, then, supposes, that, in point of law, in the case of a merely partial loss to the ship, if money is taken up on bottomry for the necessary repairs and expenditures, it becomes the duty of the underwriters to deliver the ship from the bottomry bond, to the extent of their liability for the expenditures ; and that if they do not, and the vessel is sold under the bottomry bond, they are liable, not only for the partial loss, but for all other losses to the owner from their neglect. We know of no principle of law, which justifies any such doctrine. The underwriters engage to pay the amount of the expenditures and losses directly flowing from the perils insured against, but not any remote or consequential losses to the owners, from their neglect to pay the same. It might be as well contended, *that if by the neglect to pay a partial loss, the owners were prevented from undertaking a new and [*405 profitable voyage, the underwriters would be responsible to them for such consequential loss. The maxim here, as in many other cases in the law, is, *causa proxima non remota spectatur.* The underwriters are not bound to supply funds in a foreign port, for the repairs of any damage to the ship, occasioned by a peril insured against. They undertake only to pay the amount, after due notice and proof of the loss ; and, usually, this is to be done (as was in fact the present case), after a prescribed time from such notice and proof of the loss. If, to meet the expenditures for the repairs, the master is compelled to take up money on bottomry, and thereby an additional premium becomes payable, that constitutes a part of the loss, for which the underwriters are liable. But in cases of a partial loss, the money upon bottomry is not taken up on account of the underwriters, but of the owner ; and they become liable to the payment of the loss, whether the bottomry bond ever becomes due and payable or not. In short, with the mode by which the owner obtains the necessary advances, they have nothing to do ; except that they must bear their share of the increased expenses to furnish the repairs, as a common sacrifice. Indeed, it seems difficult to understand, upon what ground it is, that in case of a partial loss, the owner is exonerated from the duty of delivering his own ship from the lien of the bottomry bond, and is at liberty to throw upon the underwriters the whole obligation of discharging it, under the penalty of being otherwise responsible, in case of a sale, not for their share of the loss (assuming that they were at all bound to discharge any part of the bond), but for the whole loss. Upon what ground, can it be said, that the loss of the vessel by the

sale, in this case, is attributable to the neglect of the underwriters, which does not equally apply to the owners? They had, at least, upon their own argument, an equal duty to perform; for the underwriters were not liable for the whole amount of the bottomry bond, but for a part only; and the owners were bound to discharge the residue. How, then, can they call upon the underwriters to pay them a total loss, on account of a sale, which, upon their own argument, was as much attributable to their own neglect, as to that of the underwriters? But we wish to be understood as putting this point upon its true ground in point of law, and that is, that in the case of a partial loss, where money is taken up on bottomry bond, to defray the expenditures to repair it, the underwriters have nothing to do with the bot-
*406] tomry *bond, but are simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode, as a part of the loss. If it were otherwise, any partial loss, however small, might, if money were taken up on bottomry to meet it, be converted, at the will of the owner, into a total loss, if the underwriters should neglect to pay to the owner the amount of such partial loss. The case of *Thornely* v. *Hebson*, 2 Barn. & Ald. 513, inculcates a very different doctrine. It was there held, that even in the case of a libel for salvage, it is the duty of the owner, if he can, to raise the money to pay the salvage; and if he makes no such attempt, but suffers the ship to be sold under the admiralty process, he cannot thereby convert a loss, which is partial, into a total loss. And it was there further said, by Mr. Justice BAYLEY (what is entirely applicable to the present case), that the sale, in order to constitute a total loss, in such a case, must be from necessity, and wholly without the fault of the owner.

The instruction asked in the present instance seems to have proceeded wholly upon the ground of the doctrine asserted in the case of *Da Costa* v. *Newnham*, 2 T. R. 407. But assuming that case to have been decided with entire correctness, upon its own particular circumstances, it seems difficult, consistently with the principles of law, to apply the doctrine to cases which are not exactly in the same predicament; and it is not the first time that an attempt has been made to press that case into the service of other cases which are essentially different. The whole argument turns upon this—that the brig never came into the hands of the owner free from the lien of the bottomry bond; and therefore, the total loss by the sale is properly attributable to the neglect of the underwriters. But the same argument would equally have applied, if there had been, for the first time, admiralty proceedings in the home port against the brig (without any bottomry bond having been given), for the repairs thus made in a foreign port, as well as for the salvage. Yet no doubt could have been entertained, that, under such circumstances, the underwriters would not have been bound to deliver the vessel from the lien thus incurred, at the peril of otherwise becoming answerable for a total loss. In what essential particular is the case changed, by the substitution of an express lien by bottomry, for an implied lien by the maritime law? In none, that we can perceive.

But what were the circumstances of the case of *Da Costa* v. *Newnham?*
*407] In that case, the insurance was for a voyage from Leghorn to *London. The ship met with an accident in the course of the voyage, and put into Nice for repairs. Upon receiving notice thereof, the assured

wished to abandon, and, indeed, was entitled to abandon; but the underwriters insisted on the ship's being repaired, telling him to pay the tradesmen's bills. He consented, at last, that the repairs should be done, but refused to advance any money; in consequence of which, it became necessary to take up a large sum of money on bottomry bond, to defray the expenses. The ship resumed and performed her voyage; and after her arrival, the underwriters were applied to, to take up the bottomry bond, but they refused. Admiralty proceedings were, as it should seem, accordingly instituted, and the ship was sold for 600 guineas, the bottomry bond being for 600*l.*, which, with the interest, amounted to a larger sum, viz., 678*l.* The question, under these circumstances, was, whether the plaintiff was entitled to recover. Mr. Justice BULLER, who tried the cause, was of opinion, under the circumstances, that for all the subsequent injury which had accrued to the owner, in consequence of the refusal of the underwriters to discharge the bottomry bond, and by which the owner was damnified to the full amount of the insurance, the underwriters were liable; because it was their own fault, in not taking up the bond for the expenses of those repairs, which had been incurred by their own express directions; and the only remaining question was, how the average was to be calculated. The jury found a verdict for the owner for 62*l.* 19*s.* which, together with 17*l.* 10*s.* paid into court by the underwriters, they calculated as the average loss per cent. which the owner was entitled to. A motion was afterwards made for a new trial, and refused by the court; substantially, upon the grounds maintained by the learned judge at the trial. From this statement of the facts, and the reasoning of the court, applicable thereto, in the case of *Da Costa* v. *Newnham*, it is apparent, that, in that case, the actual cost of the repairs (including of necessity the bottomry premium) exceeded the actual value of the ship; that the underwriters had fully authorized all these repairs, and had expressly promised to pay all the costs of the repairs and the necessary incidents. The owner of the ship, at the termination of the voyage, never came into the possession of the ship, free from the lien of the bottomry bond; for the whole amount of which, as it included nothing but the costs and incidents of the repairs, the underwriters *were liable, and which, by necessary implication, they had promised to pay. The sum [*408 claimed by the owner of the underwriters was, in fact, less than the amount of the cost of the repairs, that cost being 678*l.* whereas, the loss claimed was a total loss of the ship, which sold for 600 guineas only; and it seems, that the insurance was on an open policy. The question, in effect, therefore, was, whether the owner was not entitled to recover the full amount of the insurance, which was the amount of his actual loss, directly arising from the breach of the promise of indemnity made to him by the underwriters. Upon such a point, there should not seem to be much reason for any real juridical doubt.

Now, there are essential distinctions between that case and the present. In the first place, the repairs in this case were not made under any positive engagement of the underwriters, beyond what the policy, by its own terms, necessarily included. The language of the underwriters, in their answer, refusing the abandonment, in our judgment imports no more than this. It merely says, "we expect you to do what is necessary in the case, for the safety and relief of the vessel." It was rather an admonition than a con-

tract; a warning that the underwriters would hold the owners to the performance of all the duties imposed upon them by law, and not any promise as to their own obligations. In the next place, in the present case, the loss is to be taken, upon the very form of the instruction prayed, to be a partial loss only; and as to the repairs, the underwriters were clearly, in such a case, entitled to the deduction of one-third new for old. In the case of *Da Costa* v. *Newnham*, the loss was treated by the court as a technical total loss, on account of the amount required for the necessary repairs. In the next place, in that case, the insured asked only to recover the amount of the costs of the repairs, which in fact exceeded the value of the ship; in the present case, the cost of the repairs, and the salvage, for which the underwriters were liable, fell short of the half value; and yet the plaintiffs insist to recover for a total loss. In the next place, in that case, the underwriters, by their refusal to make any advances, compelled, and indeed authorized, the owner to resort to a bottomry bond, to supply the means of repairing the loss; and of course, as has been already intimated, the underwriters, by necessary implication, undertook to indemnify the owner against the lien
*409] and burden of the whole of *that bond, in consideration of his undertaking to cause the repairs to be made. The refusal to make good that promise, was the direct and immediate cause of the loss and sale of the ship. In the present case, the bottomry bond included charges and amounts, for which the underwriters were not liable. How, then, can it be inferred from the facts stated in the instruction, that the underwriters, by implication, and without consideration, undertook to indemnify the plaintiffs against the whole bottomry bond, for the payment of a part of which only they were by law responsible? So that, admitting the authority of *Da Costa* v. *Newnham*, to the fullest extent, which its own circumstances warrant, it stands upon grounds entirely distinguishable fram those which ought to govern the present case. If the underwriters, in the present case, had authorized the whole expenditures, on their sole account, and had promised to save the plaintiffs harmless from the whole amount of the bottomry bond, and the plaintiffs had made the expenditures, and procured the advances for this purpose, upon the faith of such authority and promise, a very different case would have been presented for our consideration. At present, it is only necessary to say, that the instruction before us stated no such case, and calls for no such opinion; and therefore, *Da Costa* v. *Newnham* cannot be admitted to govern the present case.

Upon the whole, our opinion is, that there is no error in the instructions given or refused by the circuit court, and the judgment is, therefore, affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*Daniel F. Strother, Plaintiff in error, *v.* John B. C. Lucas, Defendant.

Missouri land-titles.

The plaintiff had brought an ejectment, which was before the court on a writ of error, in 1832, and the judgment in favor of the defendant was affirmed (6 Pet. 763); he afterwards brought another action of ejectment for the same land. Had this case been identical with the former as to the merits, we should have followed the deliberate opinion delivered therein; but as one judgment in ejectment is not conclusive on the right of either possession or property in the premises in controversy, the plaintiff had a right to bring a new suit; and the court must consider the case, even if it is in all respects identical with the former, though they may hold it to be decided by the opinion therein given. It is otherwise, when the second case presents a plaintiff's or defendant's right, on matters of law or fact, material to its decision, not before appearing in the record; it then becomes the duty of the court to decide all pertinent questions arising on the record, in the same manner as if the case came before them for the first time, save such as arise on evidence identical as to the merits. In this case, we deem it a peculiar duty, enjoined upon us by the nature of the case, the course of the able and learned arguments as to the law of Spain and her colonies, in its bearing on the interesting question before us, together with a view of the consequences of our final decision thereon. Were we to leave any questions undecided, which fairly arise on the record, or to decide the cause on points of minor importance only, the value of the premises would justify future litigation; which no court of chancery might think proper to enjoin, so long as new and material facts could be developed or pertinent points of law remain unsettled.

The state of Missouri was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United States by the treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it (2 Pet. 301, &c.), by which this government put itself in place of the former sovereigns, and became invested with all their rights subject to their concomitant obligations to the inhabitants. Both were regulated by the law of nations, according to which the rights of property are protected, even in the case of a conquered country; and held sacred and inviolable, when it is ceded by treaty, with or without an stipulation to such effect; and the laws, whether in writing, or evidenced by the usage and customs of the conquered or ceded country, continue in force, until altered by the new sovereign.

This court has also uniformly held, that the term "grant," in a treaty, comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey possess or settle, whether evidenced by writing or parol, or presumed from possession; and that in the term "laws," is included custom and usage, when once settled; though it may be "comparatively of recent date, and is not one of those to the contrary of which the memory of man runneth not, which contributed so much to make up the common-law code, which is so justly venerated."

No principle can be better established by the authority of this court, than "that the *acts [*411
of an officer, to whom a public duty is assigned by his king, within the sphere of that duty, are *primâ facie* taken to be within his power." "The principles on which it rests, are believed to be too deeply founded in law and reason, ever to be successfully assailed; he who would controvert a grant, executed by the lawful authority, with all the solemnities required by law, takes on himself the burden of showing that the officer has transcended the powers conferred upon him; or that the transaction is tainted with fraud."

Where the act of an officer, to pass the title to land, according to the Spain law, is done contrary to the written order of the king, produced at the trial, without any explanation, it will be presumed that the power has not been exceeded; that the act was done, on the motives set out therein; and according to some order known to the king and his officers, though not to his subjects; "and courts ought to require very full proof, that he had transcended his powers, before they so determine it."

Even in cases of conquest, the conqueror does no more than displace the sovereign, and assume dominion over the country. "A cession of territory is never understood to be a cession of the property of the inhabitants; the king cedes only that which belongs to him; lands he had previously granted, were not his to cede. Neither party could so understand the treaty;

neither party could consider itself as attempting a wrong to individuals, condemned by the whole civilized world. The cession of a territory should necessarily be understood to pass the sovereignty only, and not to interfere with private property." No construction of a treaty, which would impair that security to private property which the laws and usages of nations would, without express stipulation, have conferred, would seem to be admissible, further than its positive words require. "Without it, the title of individuals would remain as valid under the new government, as they were under the old; and those titles, at least, so far as they were consummate, might be asserted in the courts of the United States, independently of this article."

The laws of Spain as to the disposition of the royal domain of Louisiana, while Louisiana was held by Spain.

In the treaty of cession of Louisiana, no exceptions were made, and this court has declared that none can thereafter be made. (8 Pet. 463.) The United States must remain content with that which contented them at the transfer, when they assumed the precise position of the king of Spain; the United States have so remained, as appears by their laws. By the acts of 1804, 1805, 1807 and 1816, they recognised the laws, usages and customs of Spain to be legitimate sources of titles; and by the act of 1812, confirmed to the inhabitants of St. Louis, and other villages, according to their several right or rights of common thereto, the rights, titles and claims to town or village lots, out-lots, common field lots, and commons, in, belonging or adjoining to the same, which titles depended on parol grants and local customs. The same recognition extended to grants to actual settlers, pursuant to such laws, usages and customs; to acts done by such settlers to obtain a grant of lands actually settled, or persons claiming title thereto, if the settlement was made before the 20th December 1803.

The unwritten law of Louisiana, before the cession of the territory to the United States.

In favor of long possession and ancient appropriation, everything which was done will be presumed to have been rightfully done; and though it does not appear to have been done, the law will presume that whatever was necessary has been done.

A grant may be made by a law, as well as a patent pursuant to a law; and a confirmation *412] *by a law, is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*.

The acts of the commissioners appointed to adjust and settle land-titles in Louisiana, under the acts of congress authorizing and confirming the same, are conclusive as to all titles to lands, which have been confirmed according to the provisions of the different acts of congress on the subject.

It is inconsistent with all the acts of congress which have organized boards of commissioners for adjusting land-titles, the proceedings of the board, and the laws which have confirmed them, that the confirmations of the commissioners shall inure to any other uses, or to any other person, than the person or persons claiming the confirmation: it would defeat the whole object of these laws, and introduce infinite public mischief, were the court to decide, that the confirmations by the commissioners and congress, made expressly to those who claim by derivative titles, did not operate to their own use.

ERROR to the District Court of Missouri. The counsel for the plaintiff in error, exhibited the following statement of the case:—

This was an action of ejectment, brought by Daniel F. Strother, of Kentucky, against John B. C. Lucas, of Missouri, to recover a tract of land particularly described in the declaration, as follows: "Lying and being in the city and county of St. Louis, state of Missouri, containing two arpents in breadth, by forty in depth, or eighty superficial arpents, French measure; one of which arpents by forty was granted to one Rene Kiersereau and his heirs, by the proper authority; and the other, to wit, the northern of said two arpents, was originally granted to one Gamache and his heirs; and which said two arpents by forty are bounded on the north by a forty arpent lot, originally granted to one Louis Bissonet; and on the south by a forty arpent lot, originally granted to one John Baptiste Bequette; and which said two forty arpent lots, so above bounded, have been confirmed by the

authority of the congress of the United States to the legal representatives of the said Rene Kiersereau and Gamache, respectively." The defendant pleaded the general issue, and the cause was tried at the September term 1835, when there was a verdict for the defendant, and judgment rendered thereon; to reverse which this writ of error was prosecuted.

By the evidence, it appeared, that in 1764, the post of St. Louis, in Upper Louisiana, was first established by the French, under M. *Laclede. In May 1770, the Spaniards, under the treaty of 1762, took possession of St. Louis and Upper Louisiana. Between the years 1764 and 1772, divers grants of land in Upper Louisiana were made by the French and Spanish authorities, respectively. Amongst those grants were some forty or fifty, containing each from one arpent by forty, to four arpents by forty, located in the prairie immediately west of the then village of St. Louis, and extending some distance north and south of it. These lots extended westward to the uniform depth of forty arpents, being parallelograms whose opposite sides were on the north and south, forty arpents in length; and on the east and west from one arpent to four arpents. [*413

Some time in the year 1772, a survey was made, as above described, of these lots, by Martin Duralde, the authorized surveyor of the post of St. Louis. About that time, a fence was established on the eastern boundary of the above range of lots, which separated them from the village, and what was called the commons; there was no division fence, nor any fence on the western boundary; the lots were contiguous to each other; but each lot was held separately, and cultivated separately, by its proprietor or occupant, who was bound by the regulations of the post, to keep the fence in front of his lot (or of whatever number of lots he occupied) in good repair. The surveys so made by Duralde, were entered in a book called the *Livre Terrein.*

Amongst the lots so surveyed and entered, were the two lots in question, described and bounded as in the declaration in this cause. The surveys so entered, and the grants by virtue of which said surveys were made, were solemnly recognised and affirmed by the Spanish lieutenant-governor, Don Pedro Piernas; and by his predecessor, the French commandant, St. Ange de Bellerive. The entry in the *Livre Terrein*, No. 2, p. 68, which contained this recognition of said grants and surveys, was printed by authority of congress, and to be found in Gales & Seaton's American State Papers, vol. 3, p. 677. In the entry in the *Livre Terrein*, of the survey of Gamache's arpent, the grantee is called "Joseph" Gamache. This was a mistake, as was shown fully by the evidence in the cause. It was conclusively proved that the name of Gamache, the grantee, was John Baptiste Gamache, and that no such man as "Joseph" Gamache, existed, at that time, in Upper Louisiana. *The defendant admitted upon the record, that the grantee, Gamache, was known as well by the name of John Baptiste Gamache, and of Baptiste Gamache, as Joseph Gamache; but the fact, as proved in evidence, was, that his name was John Baptiste Gamache, and none other. [*414

Immediately after the grants so made to Kiersereau and Gamache, they took possession of their respective lots, and commenced the cultivation thereof, as acknowledged owners and proprietors, by virtue of said grants and surveys. John Baptiste Gamache continued to occupy and cultivate, until about January 1773, when Louis Chancellier took possession; and

Rene Kiersereau, until about the year 1780, when the said Louis Chancellier succeeded him in the occupation and cultivation of his lot. Louis Chancellier continued in possession and cultivation of both these lots, claiming the same, as proprietor thereof, by purchase from the original grantees, until his death, in April 1785. Previous to his death, on his marriage with Marie Louise Dechamp, a marriage contract was executed between him and said Marie Louise, by which a *communante* (partnership), according to the Spanish law, was enacted between them. On the death of her husband, the said Louis Chancellier, the widow, by virtue of her rights under the *communante*, was in lawful possession of the common property of herself and husband, and, consequently, of the two arpents by forty in question. On the 8th June 1785, an appraised inventory "of all the property, movable and immovable, which is ascertained to belong to the said deceased (Louis Chancellier) and to his wife, Dona Louisa Dechamp," was made in due form of law, by the lieutenant-governor, Don Francisco Cruzat. In this inventory, the two arpents in question were described by their metes and bounds; that is to say, "two arpents and a half of land in the prairie, bounded on the one side by land of Bequette, on the other by land of Mr. Bijou." The names of Bijou, or Louis Bissonet, were admitted and proved to mean the same individual.

On the 11th June 1785, a petition was presented to the lieutenant-governor, by said widow, and Charles Tayon, the guardian of the property of the infant son of said Louis Chancellier and Marie Louise, praying that said property "in their possession," should be sold at public sale; and on the same day, in pursuance of said petition, an order of sale was made; and on the day following, to wit, the 12th *June 1785, the lieutenant-governor, Cruzat, proceeded to sell the property described in the inventory, and did actually sell a considerable quantity thereof; and amongst other property, the two arpents described as above, were sold and adjudicated to the said Marie Louise Chancellier, for the sum of one hundred and fifty-five livres. At the same sale, on the same day, was also sold the slave Fidel, belonging to said estate and described in the inventory, to one Hyacinth St. Cyr, whose security for the payment of the purchase-money (two thousand one hundred livres) was August Choteau; the former signing by his mark in the margin of the sale, the latter signing his name in full thereon. The first article sold was said Fidel, and the sixth, was the two arpents in question. The sale was declared to have been made at the dwelling of said widow, "in whose possession are all said goods" ("*bienes*" in Spanish, which means "property" generally). Afterwards, by order of the 14th June 1785, the sale was suspended for want of competent purchasers, and the balance unsold ordered to be delivered to the widow at the valuation, on condition that she be charged with the same on final partition between her and her son.

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On the 8th June 1786, on petition by the said widow and guardian, a partition was ordered to be made between the widow and said infant; and accordingly, an account and partition was made, whereby it appeared, that said widow was charged with the sum of one hundred and fifty-five livres, being the price of said two arpents by forty, by her purchased at the sale of her husband's property. It appeared, that the balance coming to the minor, amounting to six thousand three hundred and thirty-four livres,

seven sous, six deniers, was duly paid over to his guardian, said Charles Tayon, and the sum of $3000 (including said lots, valued at one hundred and fifty-five livres) duly paid to said widow. This final settlement and partition was made on the 13th day of September 1787, in pursuance of the decree of the governor-general, Don Estaban Miro, bearing date 25th February 1787, all which was set out at large upon the record.

Thus it appeared, that in pursuance of a final decree made by the supreme authority in Louisiana, the widow of Louis Chancellier was declared and adjudged to be the lawful owner and possessor of the said two arpents, bounded as described in the declaration in this cause; and that the judgment of partition and final settlement so made, in *favor of said [*416
Marie Louise Chancellier, bore date the 13th day of September 1787.

In addition to the above proof of the title of Marie Louse Chancellier to said two lots, the plaintiff gave in evidence: 1st. An authentic deed of exchange between John B. Gamache and said Louis Chancellier, bearing date 23d January 1773, acknowledged and executed in presence of Don Pedro Piernas, lieutenant-governor of Upper Louisiana; whereby said John B. Gamache, as original grantee of said one by forty arpents, conveyed the northern half thereof to said Louis Chancellier, in exchange. 2d. An authentic deed, dated 6th April 1781, acknowledged in presence of Francisco Cruzat, lieutenant-governor of Upper Louisiana, whereby Marie Magdalene Robillard conveyed to said Louis Chancellier, one arpent by forty, bounded by Jno. B. Bequette, and by Jno. B. Gamache's arpent, being the same granted to Rene Kiersereau. In this deed was signed the name of Rene Kiersereau, as "assisting witness;" and his name also, as a party witness, was mentioned in the body of the deed. It was in evidence, that no other man than the grantee existed in Upper Louisiana, of the name of Rene Kiersereau; and that Marie Magdalene Robillard was the wife of said Rene. Besides this, the signature of said Rene Kiersereau to this deed was fully proved; as was also that of the lieutenant-governor to this deed, and also that of Jno. B. Gamache. It was fully proved, that said Rene Kiersereau ceased to occupy or cultivate his lot, from the year 1780; and that Louis Chancellier immediately succeeded him in the possession and cultivation thereof; and, as above stated, remained in possession till his death, in April 1785.

In September 1788, the widow of Louis Chancellier intermarried with one Joseph Beauchamp, and removed to St. Charles, about twenty miles from St. Louis, on the left bank of the Missouri river. Some time after the removal of said Beauchamp and wife to St. Charles (about 1790), Hyacinth St. Cyr, the same who purchased the slave Fidel, at the sale of Louis Chancellier's property, entered upon the two arpents in question, and commenced the cultivation of the same, by permission of said Marie Louise; which permission, according to the testimony of said Marie Louise, was given by her said second husband, Joseph Beauchamp; and according to the testimony of Madame St. Cyr, the widow of said Hyacinth St. Cyr, the *syndic au- [*417
thorized said St. Cyr to occupy and cultivate, and that afterwards her husband had his deeds from Kiersereau and Gamache, as her husband told her.

In 1797 or '98, the eastern and only fence of those forty arpent lots fell down; and they again became a wilderness, unoccupied and uncultivated by any body, until some time in the year 1808, when the defendant took pos-

session of them, and inclosed a part of the eastern end thereof, under a deed of conveyance from Auguste Choteau, the same who signed a security for St. Cyr, on the margin of the record of sale of Chancellier's property, as before stated. In 1815, under the act of congress of 1812, the above two lots were confirmed to the legal representatives of the original grantees; and in said confirmation, the recorder made special reference to the *Livre Terrein*, No. 2, pages 11 and 12, in which the surveys in favor of Kiersereau and Gamache were recorded. In 1816, by act of congress of the 29th April 1816, § 1, the aforesaid confirmations were ratified.

The plaintiff then gave in evidence a deed of conveyance from Augustus Gamache, the survivor of the two sons and heirs of John B. Gamache, of his estate, whatever it might be, in said one by forty arpents granted to his father, John B. Gamache, to Basil Laroque and Marie Louise Laroque, his wife. Basil Laroque was the third husband of said Marie Louise, the widow of Louis Chancellier. The plaintiff then gave in evidence deeds of conveyance, duly acknowledged, from said Basil Laroque and Marie Louise, of the said two by forty arpents to George F. Strother, and a deed from said Strother to plaintiff.

Here the plaintiff closed his case, and the defendant then gave in evidence: Two deeds, bearing date same day, the 23d October 1783, the one purporting to be a conveyance by said Rene Kiersereau to said Hyacinth St. Cyr, of the one by forty arpents granted to said Rene Kiersereau; the other purporting to be a deed from "Joseph" Gamache, of the one by forty arpents granted to Gamache; which deed was signed Batis ⋈ Gamache. In both those deeds, it was recited, that for several years previous to their date said, St. Cyr had been in possession, and was then in possession of the lots in question. The defendant then gave in evidence certain proceedings
*418] dated *in 1801, in the matter of Hyacinth St. Cyr, a bankrupt; by which it appeared, that amongst the property sold by the syndic on that occasion, "two arpents of land, in the first prairie of St. Louis, near the tower, by forty arpents in depth, bounded on the one side by the widow Bissonet, and on the other by Mr. Hortiz," were adjudicated to Mr. Auguste Choteau for twelve dollars. The defendant then gave in evidence extracts from the proceedings of the board of commissioners, of which board said defendant was a member; purporting to be a confirmation of said two arpents by forty to Auguste Choteau, as assignee of Hyacinth St. Cyr, assignee of said original grantees. He also gave in evidence a deed, dated 11th January 1808, from said Auguste Choteau and wife to said defendant, purporting to convey, in fee, to said defendant, said two arpents by forty; "of which forty arpents have originally been ceded to Rene Kiersereau, and the other forty arpents have been originally ceded to Joseph Gamache, the whole bounded by a tract of land originally conceded to John B. Bequette, and by another tract originally conceded to Louis Bissonet; the whole belonging to us (the said Choteau and wife), as having become the purchasers of it at the public sale of the property of Mr. Hyacinth St. Cyr." The defendant then read to the jury certain extracts from the proceedings of the board of commissioners, of which he was a member; by which it appeared, that the said board met at St. Charles, on the 3d of August 1807, and held their session there until the 8th of the same month and year. The defendant lastly read in evidence an extract from the record of a judgment, in an

action of ejectment for said lots, in the district court of the United States, in which the said Daniel F. Strother was plaintiff, and said John B. Lucas was defendant; and there closed his case in defence.

The plaintiff in reply, proved by extracts from the records of the board of commissioners, that the defendant was a member of the board before which Auguste Choteau filed his claim as assignee of St. Cyr, assignee of the original grantees; and that while said claim was pending, and before any action of the board was had upon it, Lucas being still a member of the board, took the deed of conveyance aforesaid, of the 11th January 1808, from the said Auguste Choteau.

It was admitted on the record, that the plaintiff was a citizen of Kentucky, *and that the premises in dispute were worth more than $2000. The [*419
case being closed on each side, the plaintiff then moved the court to instruct the jury as follows:

1. That there was evidence before the jury, of the possession and title of Rene Kiersereau and John B. Gamache, as absolute owners and proprietors of the two forty arpent lots described in the declaration.

2. That there was evidence before the jury, of the possession and title of Louis Chancellier, as owner and proprietor of the two forty arpent lots in question, as assignee of said Rene Kiersereau and said John B. Gamache, respectively.

3. That there was evidence of the actual possession, after the death of said Louis Chancellier, by his widow, said Marie Louise, of said two forty arpent lots, claiming the same as absolute owner thereof.

4. That the plaintiff had established his title, as assignee of Marie Louise Chancellier, to the estate and interest vested in her and her heirs, in and to the two forty arpents in question.

5. That the deed given in evidence by plaintiff from Auguste Gamache to Bazil Laroque and Marie Louise, his wife, inured to the benefit of the plaintiff.

6. That if the jury should be of opinion from the evidence, that Hyacinth St. Cyr originally obtained possession of the lots in question, as tenant of Marie Louise, the widow of Louis Chancellier, or by virtue of a permission to occupy and cultivate, given to said St. Cyr, by the syndic of the village of St. Louis; the possession of St. Cyr, so obtained, should be taken by the jury as, in law, the possession of said Marie Louise.

7. That the confirmations of the board of commissioners, on the 23d July 1810, of which the defendant was a member, could, at most, only operate as a quit-claim by the United States in favor of the original grantees; and could not decide the question of derivative title, under said original grantees.

8. That the mere fact of the land described in the confirmation, to Choteau, and the land described in the confirmation given in evidence by the plaintiff, and the declaration being identical, did not entitle the defendant to a verdict in his favor.

9. That no forfeiture or disqualification had accrued against Madame Marie Louise, the widow of Louis Chancellier, or against her assigns, under any act of congress, whereby she or they were barred *from asserting [*420
their legal and equitable rights to the lots in question before this court. Which instructions were given by the court.

The plaintiff also moved that the following instructions be given to the jury :

1. That the sale, and partition, and final decree, of which duly certified copies had been given in evidence by the plaintiff, established the title of the widow of Louis Chancellier, Madame Marie Louise Deschamps and her heirs, to the land described in said sale and partition, as sold and allotted to her, part of which said land consists of the two arpents by forty, in the declaration described, bounded by Bijou on the one side, and by John B. Bequette on the other.

2. That independently of the title of Rene Kiersereau and John B. Gamache, there would be sufficient evidence before the jury to establish a title by prescription in Louis Chancellier and his heirs, and Marie Louise, his widow and her heirs, to the two forty arpents described in the declaration.

3. That Hyacinth St. Cyr took no title by prescription in and to said lots.

4. That if the jury should be of opinion, that Hyacinth St. Cyr had notice of the sale of said lots to Marie Louise, by the proper Spanish authority, as given in evidence by the plaintiff ; the possession of said Hyacinth St. Cyr of said arpents, was not such as could be adverse to said Marie Louise, or could create an estate by prescription in favor of said St. Cyr.

5. That if the jury should be of opinion from the evidence, that St. Cyr was a purchaser of the public sale of the property of Louis Chancellier, or signed his name, or made his mark as purchaser, on the margin of said sale; these facts were *primâ facie* evidence that said St. Cyr had notice of the title of said Marie Louise, as purchaser at said sale, of the lots therein described, as sold to her.

6. That the deeds given in evidence by the defendant from Rene Kiersereau, bearing date the 23d of October 1793, conveyed nothing to St. Cyr; being made by a person out of possession, and whose conveyance for the same land, by another person, to Chancellier, was upon record ; and who, therefore, was guilty of the crime of "*estelionato*," punishable by fine and banishment, by the Spanish law then in force.

7. That the deed given in evidence by defendant from Joseph Gamache to Hyacinth St. Cyr, dated 23d October 1793, was void, on *the ground of "*estelionato*," in Batis Gamache, supposing that he made the deed ; 2d, on the ground of uncertainty in the deed itself, in this, that it purported to be a deed of Joseph Gamache, and was signed Batis ⋈ Gamache.

*421]

8. That Auguste Choteau took no estate by prescription, in either of said forty arpent lots in question.

9. That there was no evidence of possession whatever, adverse or otherwise, by Auguste Choteau, of said two forty arpent lots, or of any part thereof.

10. That if the jury should be of opinion, from the evidence bofore them, that the said Auguste Choteau had notice of the public sale of said lots, to Madame Marie Louise Chancellier, his possession or claim to said lots under Hyacinth St. Cyr was fraudulent and void, as against said Marie Louise and her heirs and assigns.

11. That the certified copy of the proceedings and sale by the syndic, in the matter of Hyacinth St. Cyr, a bankrupt, was not evidence either of St.

Cyr's title to either of the lots in question, or that the same were sold by said syndic to said Auguste Choteau, as part of said St. Cyr's property.

12. That the defendant had shown no title by prescription, under the Spanish or civil law, or by the statutes of limitation (in bar of plaintiff), under the Anglo-American laws, to the lots in question.

13. That the title of the defendant, as assignee of Auguste Choteau, was vitiated by the fraud which vitiated the title of Choteau and of St. Cyr.

14. That the deed from Auguste Choteau and wife to Lucas, of the lots in question, dated 11th January 1808, was void for fraud; if, in the opinion of the jury, it was a sale and conveyance to Lucas of a claim and interest pending before said Lucas himself for adjudication.

15. That if, in the opinion of the jury, the claim was pending before Lucas, as commissioner, when he bought it, the adjudication or confirmation of it, on the 23d July 1810, by the board of commissioners, of which Lucas was a member, was fraudulent and void at law and in equity.

16. That neither the statute of limitation, nor the Spanish law of prescription, could avail the defendant, Lucas, independently of the possession of St. Cyr and Choteau.

17. That the orders of survey given in evidence by the defendant, and made by himself and his two colleagues, in favor of Auguste Choteau, bearing date June 10th, 1811, was fraudulent and *void; if the jury should be of opinion from the evidence, that the claims therein ordered [*422 to be surveyed, had been sold to said defendant, by said Choteau, previous to the date of said order, and while said claims were pending for adjudication before said defendant, as a member of the board of commissioners, in said order mentioned.

18. That if any penal effect resulted from any act of congress, to Mad. Chancellier and her assigns, or to the legal representatives of Rene Kiersereau and J. B. Gamache; the act of congress of January 1831, entitled "an act further supplemental to the act entitled an act making further provisions for settling the claims to lands in the territory of Missouri," passed the 13th day of June 1812, remitted the parties to their original legal and equitable rights and titles, as if no such penal acts had ever been in force.

19. That upon the case made by plaintiff, he was entitled to a verdict for all that part of the two forty arpents lots in question, situated west of Seventh street, in St. Louis, and all the lots east of Seventh street, according to the admissions of defendant, as above.

20. That in this case there was no law or binding ordinance of the Spanish government, by which Madame Chancellier, and those claiming under her, could be deprived, according to the state of the evidence in this case, of whatever title she acquired to the land in question, under the purchase made of it by her, as the property of her husband.

21. That if the jury believed from the evidence, that St. Cyr ceased to cultivate and b[illegible] in actual possession of the premises in dispute, from 1797 or 1798, prescription ceased to run in his favor, and that of those who claimed under him, from that time.

Which instructions the court refused to give; but instructed the jury in relation to the matters referred to in the first instruction above refused. "that the sale, and partition, and final decree, the record of which certified copies have been given in evidence by the plaintiff, did pass the title of

Louis Chancellier, mentioned in said proceedings of sale, such as it was at the time of his death, or such as it was in his heirs, at the time of said sale to Madame Marie Louise, his widow, mentioned in said proceedings, and her heirs, to the lands described in said record of sale and partition, as sold and allotted to her." And further instructed the jury, in relation to the matters mentioned in the fifth instruction above refused, "that if the jury
*423] should *be of opinion, that St. Cyr, under whom the defendant claims, was a purchaser at said public sale of the property of said Louis Chancellier, or did sign his name or make his mark on the margin of the record of said sale; these facts, or either of them, were evidence proper for them to consider, in ascertaining whether said St. Cyr had notice of the said title of said Marie Louise, as purchaser at the said sale of the lots described in the record thereof as sold to her." And further instructed the jury, in relation to the matters referred to in the eleventh instruction above refused, "that the certified copy of the proceedings and sale by the syndic of the property and estate of St. Cyr, as a bankrupt, was not evidence of a title to said St. Cyr to the lots in question, or either of them." And further instructed the jury, in relation to the matters referred to in the twelfth instruction above refused, and to the statutes of limitation referred to in that refused instruction, "that the defendant had shown no title to the lots in question, nor any bar to the plaintiff's recovery, under any statute or statutes of limitation." And further instructed the jury, in relation to the matters referred to in the sixteenth instruction above refused, "that the statute of limitations could not avail the defendant Lucas, either with, or independent of, the possession of St. Cyr." And further instructed the jury, in relation to the matters referred to in the eighteenth instruction above refused, "that although the act of congress of the 31st of January 1831, referred to in said refused instruction last mentioned, does not remit the penalties, as in that refused instruction is supposed by the plaintiff; yet, that in fact no penal effect results from any act of congress which bars or stands in the way of the plaintiff's recovery in the present action, or which in any manner affects his title, or evidence of title, under, or to be derived from, said acts, or any of them, under the admissions of the parties in the present case." The counsel for the plaintiff excepted to the opiuion of the court in refusing to give the several instructions; as well as to the opinion of the court in giving the instructions which they did give.

The defendant then moved the court to instruct the jury as follows: 1st. That if the jury found from the evidence, that Hyacinth St. Cyr, and those lawfully claiming under him, have possessed the two arpents by forty,
*424] surveyed for Gamache and Kiersereau, without interruption, *and with claim of title, for thirty years, consecutively, prior to 1818, the plaintiff was not entitled to recover in this action. 2d. If the jury found from the evidence, that Hyacinth St. Cyr, and those lawfully claiming under him, possessed the two lots in the declaration mentioned, for ten years, consecutively, prior to, and until, the 23d day of July 1810; and that the lands confirmed to Auguste Choteau on that day are the same lands in the declaration mentioned, the plaintiff could not recover in this action. 3d. If the jury found from the evidence, that the defendant possessed the lots of land in the declaration mentioned, for ten years, consecutively, prior to the 1st of

October 1818, the plaintiff could not recover in this action. Which instructions the court gave to the jury, with the further instructions:

"That the possession mentioned must be an open and notorious possession; and that if they should find such possession, it gave title under, and according to, the Spanish or civil law, which was in force in Upper Louisiana, at the date of the treaty by which Louisiana was acquired by the United States; and remained in force and unabrogated by any law of the district of Louisiana or of Missouri down to a period as late as October 1818. That the possession of ten or thirty years would give a title, the one period or the other, according to the circumstances under which the possession was obtained. That the ten years' possession which would give a prescriptive title, must be a possession under a purchase made in good faith; and where the purchaser believed that the person of whom he purchased had a good title; and where the owner of the title prescribed against resided in the same country, during the said ten years. That if the jury believed from the evidence, that the possession of St. Cyr, under whom the defendant claims, was obtained under a purchase made by him in good faith, and under the belief that the person of whom he purchased had a good title; and that the possession of Choteau, under whom the defendant claims, was obtained in like manner, and under a purchase made with the like belief; and that they had the possession mentioned in the second instruction asked for on the part of the defendant; and that the said Marie Louise was in the country during the said ten years; the plaintiff cannot recover in this action." And further instructed the jury, in relation to the possession mentioned in the third instruction asked for on the part of the defendant, "that to make the possession there mentioned a bar to the plaintiff's *recovery in [*425
the present action, the possession of the defendant must have been obtained under a purchase, where he believed that the person of whom he purchased had a good title; and that the said Marie Louise was in the country during the said ten years, which, unless the jury believe, they cannot find for the defendant upon such possession." To which opinion, the plaintiff excepted.

Afterwards, the judge, of his own motion, further instructed the jury, as follows: That the possession which the said Louis Chancellier had at the time of his death, passed to his heirs, and afterwards to his widow, the said Marie Louise, under the purchase made by her, at the said public sale of the estate of the said Louis, and that the possession of the said Marie Louise would be presumed to continue in her and her heirs, until an adverse possession was shown; and would continue in her, her heirs or assigns, until an adverse possession was actually taken. And further instructed the jury, that if they should find from the evidence, that said St. Cyr took possession, or was in possession of the lands in controversy, or any of them, under the said Marie Louise, or as her tenant, his possession, so taken or held, would be the possession of the said Marie Louise, and would not be a possession in St. Cyr, available by him or those claiming under him, under the law of prescription mentioned. But that if the jury should be of opinion, that said St. Cyr came to the possession of the land in controversy, not as the tenant of the said Marie Louise, or under her, but under a claim and title adverse to her, such adverse claim and possession would constitute a possession, upon which, a prescription, by the Spanish or civil law referred to, and then

in force, would begin to run in favor of him, and those claiming under him, if such possession was actual, open and notorious; and that such possession, so commenced, would constitute and preserve to said St. Cyr, his heirs or assigns, a possession, available under the law of prescription referred to, notwithstanding said St. Cyr, or those deriving title from him, should leave the actual possession, or cease to occupy and cultivate, if that abandonment of the actual possession, occupancy or cultivation, was with the intention to return, and without any mental abandonment of the possession. And further instructed the jury, that if they should be of opinion from the evidence, that
*426] Rene Kiersereau, under whom the parties *claimed, did attest the sale of the lot in controversy, which both parties, in the present case, claimed under him, alleged to be made by Marie Reno Robillia to said Louis Chancellier, by becoming a subscribing witness to the instrument of sale, in evidence on behalf of the plaintiff, and purporting to be signed by said Marie Reno Robillia, and that said Rene Kiersereau, at the time of becoming such subscribing witness, was the husband of said Marie Reno—the title of said Rene Kiersereau would, from his presumed assent to said sale, and presumed receipt of the consideration expressed in said instrument, as the husband of said Marie Reno, in presumption of law, pass by said sale to Louis Chancellier. That the subscribing witnesses to a sale in writing, made before a notary, or other officer acting as such, are presumed to have been informed of the contents of the written instrument of sale, because, by the civil or Spanish law referred to, which was in force in Louisiana, it was the duty of the notary, or other officer, to make known to the witness, as well as to the parties, the contents of the writing which they attested and subscribed. But that the jury would consider, from the evidence, and the circumstances in evidence, in this case, whether the said Rene, being the husband of the said Marie Reno, did become the subscribing witness to said instrument. And if they should be of opinion, that he did not, or that the same was fraudulent, as against him, his title was not passed by the alleged sale. That if the jury find, that the title of said Rene Kiersereau did pass by said sale to Louis Chancellier, and that the land so acquired by him, and also the land derived by the plaintiff under said Gamache, are the said lands mentioned in the declaration; they will find a verdict for the plaintiff for those lands, or so much thereof as are described in the declaration; unless they find that the title has been lost by him, or those under whom he claims by prescription, according to the principles already stated by the court. And further instructed the jury, that if they should find from the evidence, that the residue of the land mentioned in the declaration, or any part thereof, was in the possession of Louis Chancellier, at the time of his death, and that he and those claiming under him had such possession for thirty years, consecutively, they would find for the plaintiff, for such residue, so possessed; unless they should find, that his right, so acquired, had been lost by prescription, under an adverse possession, according to the principles already stated.

*427] *The case was argued by *Lawless* and *Benton*, for the plaintiff in error; and by *Geyer* and *Jones*, for the defendant.

In support of the assignment of errors in this case, the *plaintiff's* counsel contended: 1. That the lots in question constituted a property in the

grantees thereof, and their heir or assigns, which was protected and guarantied by the treaty of cession of Louisiana by France to the United States. 2. That at the date of the treaty of cession of Louisiana by France to the United States, the lots in question were vested, by title of the highest order, in Marie Louise, the widow of Louis Chancellier, who died in April 1785. 3. That the original grant of said lots, respectively, had not only been vested, by title of the highest order, in Marie Louise, so far as said title could be given by the supreme power in Louisiana, while a province of Spain, but had since been confirmed by the government of the United States to said original grantees, and their legal representatives. 4. That at the date of said confirmation by the United States, the said Marie Louise, the widow of Louis Chancellier, was the true assignee and legal representive of the said original grantees. 5. That the title of said Marie Louise, and of said original grantees, was now fully vested in the plaintiff. 6. That the title of the plaintiff, as assignee of Marie Louise, the widow of Louis Chancellier, to the lots in question, had been fully made out and established by the evidence in the cause; and had not been invalidated or rebutted by the defendant, either by showing a better title under the original grantees, or by showing a title in him by prescription, or limitation, or forfeiture, or escheat; or by establishing any other title adverse to that of plaintiff.

Baldwin, Justice, delivered the opinion of the court.—The plaintiff brought an ejectment in the district court of Missouri, *to recover possession of two pieces or tracts of land, formerly common field lots [*428 adjacent to the village, and now part of the city of St. Louis; a verdict and judgment was rendered for the defendant, on which the plaintiff brought his writ of error. The whole merits of the case have been brought before us, by the whole evidence given at the trial, and forty-three instructions asked, refused or given, spread out in the record; which present a case of great interest, as well in reference to the value of the property in controversy, as the principles which are necessarily involved in its decision.

Both parties claim under Rene Kiersereau and John B. Gamache; each of whom were in possession of one of these lots, at a very early period after the founding the village of St. Louis in 1764, while Louisiana was under the dominion of France, though she had ceded it to Spain, two years before, by the *secret* treaty of Fontainebleau. Spain took possession of the province in 1769–70, from which time she held it, till she ceded it to France in 1800; the laws of Spain were established in it, but title of those who had received grants from the local authorities, or made settlements, either in the villages or on the public domain, before the actual surrender of the province by France, were respected. Accordingly, it appears, that in 1772, the following instrument was executed between the French and Spanish governors, which is found in the 3d vol. Am. State Papers—Public Lands—and is of the tenor and purport following:

Translation of a French document marked C., published in the third volume of the American State Papers—Public Lands, p. 679, truly and faithfully made and written by me, Robert Greenhow, translator of foreign languages in the department of state of the United States.—Washington, February 26, 1838.

Cadastre, (*a*) formed by me, Martin Duralde, surveyor, appointed by Mons. Don Pedro Piernas, captain of infantry, and lieutenant-governor of the establishments and other dependencies of the Spanish government of the Illinois, and deposited in the archives of the said government, in form of *proces verbal*, to serve to designate the various tracts of land granted in the name of the king to the inhabitants of this post of St. Louis; as well by title (deed) as by verbal consent, by the chiefs who have governed them from the foundation *(of the government) to this moment, which
*429] I have surveyed; and which, after the exchanges, cessions or sales which may have been made of them, for the convenience or advantage of each person, are actually in the possession of the persons hereinafter named, agreeably to their own attestations and reciprocal acknowledgments, situated in the prairies, contiguous to this same post, in the order and according to the directions detailed as follows:

I thus attest it by my signature, and by the unanimous acknowledgments of all the above-mentioned proprietors, assembled at this moment, with the approbation of my said Sr. Don Pedro Piernas, in the chamber of the government, to serve as mutual witnesses, and to affirm the fact, some by their signatures, the others, from not being able to sign, by their declarations in presence of Messrs. Don Pedro Piernas, the above-mentioned lieutenant-governor, and Don Louis St. Ange de Bellerive, retired captain and first predecessor in command of this said post, both serving, to wit, the latter, to certify by his signature, in his said quality, and in virtue of the power confided to him, that he had granted either by title (deed) or verbally, the above-mentioned lands, in the name of his majesty (the king of France); and my said Sr. Piernas, to approve, confirm and ratify likewise, by his signature, in his actual character of lieutenant-governor, whereby he is provided with the same power of granting (*conceder*) the possessions allowed to be good (*accordées*) (*b*) by my said Sieur de St. Ange, and specified in the body of this *cadastre*, which I deposit, containing sixty-eight pages of writing, including the present, in the archives of this government, to be there preserved for ever, and to serve for the uses, the assurance, authenticity and testimony of all therein set forth, at St. Louis, on the twenty-third of May, in the year 1772.

M. Duralde,	Amable Guyon,
Laclede Liguest,	Sarpy,
Dodie,	Cotte,
A. Conde,	St. Ange,
Rene Kiersereau,	Pedro Piernas.
Becquet,	

St. Louis, January 7, 1812. M. P. Leduc, T. B. C., L. T.

True extract from the Livre Terrein, Book N. 2.

(*a*) Note by the translator. A *cadastre* is an official statement of the quantity and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property. R. G.

(*b*) Note by the translator. The French word *conceder* means to grant; *accorder*, among many significations, of which to grant is one, has that of acknowledging or declaring any proposition to be good or true; and from the context, such appears to be its sense in the paper here translated. R. G.

*Pursuant to this most solemn act, surveys were made of the lots respectively claimed and possessed by Kiersereau and Gamache, by the public surveyor, and entered of record on the land-book of the province; and they continued in the quiet enjoyment of the lots, from that time, as they had previously held them according to the laws, usages and customs of France, while under the government of the province of the Illinois. The plaintiff claims the premises in controversy under and in right of Kiersereau and Gamache, by the following chain of title.

1. By a deed made in 1781, from Marie Magdalena Robellar, the wife of Rene Kiersereau, to Louis Chancellier, conveying one of the lots in question (being the one owned by Kiersereau), containing one arpent in front, by forty in depth, to which, as the plaintiff alleged, Kiersereau was an assisting witness, whereby his right passed to the grantee of his wife, according to the law of Spain, in force in the province. The consideration was four hundred livres, equal to $80.

2. By a deed of exchange, made in 1773, between Chancellier and Gamache, whereby the latter conveyed to the former, one-half of his lot, being one-half arpent in front by forty back, in exchange for an ox; and a half front arpent, by the same depth, which Chancellier had owned before. Both deeds were executed in the hall of the government, in the presence of the local governor, and signed by him. The witnesses of assistance to the latter were, M. Duralde, the surveyor-general, and Alvarez, a sergeant in the garrison; to the former, the witnesses of assistance were, as named in the concluding clause of the deed, "Rene Gueircero," and in the attestation, "Rene Kirgeaux," and Louis Rover.

3. By a deed from one of the heirs of Gamache, conveying to Basil and Marie Louise Laroque (formerly Madame Chancellier), his right in and to the remaining half of the Gamache's lot, for the consideration of one dollar. This deed bears date 22d June 1827.

4. By deeds from Laroque and wife, made in March 1827, and September 1828, conveying to George F. Strother, the two arpents by forty, to which she claimed right under Gamache, Kiersereau and Chancellier, in consideration of $300.

5. By deed from George F. Strother to Daniel Strother, the plaintiff, dated July 1827, conveying the premises in controversy to him for the consideration of $300.

*The title of Laroque and wife is thus deduced: Louis Chancellier took possession of the lots conveyed to him as before, held and [*431 cultivated them, till his death in 1785; when, by a judicial proceeding before the lieutenant-governor, in his judicial capacity, conducted in conformity with the laws of Spain, the whole estate of Chancellier was inventoried, and appraised by sworn appraisers; the result of which was, that a final adjudication was made, in 1787, by the governor, which was signed by him and the parties concerned, who consented thereto. By this adjudication, the real and personal estate of Chancellier, after the payment of his debts, was divided between his widow and their only child, according to the laws of distribution in the province; the one and a half arpents were allotted to the widow at one hundred and fifty-five livres, equal to $31, for the sixty arpents, being fifty-one cents per arpent: the half arpent was also allotted to her at eight livres, equal to one dollar sixty cents for the twenty

arpents being eight cents per arpent; which is a little more than four-fifths of the English acre, the proportion between them being as one hundred of the former to eighty-five of the latter. Madame Chancellier married again in 1787 or '88, about two and a half years after Chancellier's death, and immediately removed, with her husband, one Beauchamp, to St. Charles, a village about twenty or twenty-five miles from St. Louis; where she continued to reside, without making any claim to the lots, till about 1818; and no suit was brought to recover possession thereof, till the present plaintiff prosecuted his claim, under her right, in the case between the same parties, reported in 6 Pet. 763.

Waiving, for the present, the consideration of a question raised at the trial, whether Rene Gueircero, or Rene Kirgeaux, was the real and true Rene Kiersereau, the rightful owner of part of the property in controversy between the parties, or another person, we are clearly of opinion, that Madame Chancellier, in 1787, had a good title to the forty arpents formerly owned by Kiersereau, and the twenty arpents conveyed in exchange by Gamache to Chancellier, in such right, and by such tenure as was given and prescribed by the laws of Spain, and the province, which will be hereafter considered; and that we cannot question the validity of those acts of the local governor, whether acting in his political or judicial capacity, for reasons hereafter to be given.

As to the twenty arpents held by Gamache, there is no written *evidence, that his right thereto was ever conveyed, in whole or part, before 1827, to the plaintiff, or any person under whom he claims; nor is there to be found in the record, any other evidence of any right thereto in Chancellier, unless it may have been by possession or mere claim. We find in the inventory and appraisement of his estate, in 1785, that the sixty arpents were then, in wheat, valued at six hundred livres, equal to $120, or two dollars per arpent, with the crop in the ground; and the twenty arpents, valued at fifteen livres, equal to three dollars, or fifteen cents per arpent; also, that the whole eighty arpents were allotted to the widow, by the final adjudication in 1787. This is, undoubtedly, evidence of a claim by Chancellier, and its recognition by the local authorities, of its rightful existence, so far as it extends, competent for the court below and jury to consider. But for the present, we shall take these proceedings, and any possession by Chancellier, as not operating, *per se*, to divest the lawful title of Gamache to the twenty arpents, such as it was under the laws of Spain, the acts of the local authorities, and his possession and cultivation pursuant thereto. Whether there is any evidence in the record which can have that effect, will be a matter for future consideration, should it be deemed important.

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Thus taking the plaintiff's title, we proceed to state that of the defendant, who claims under and in right of Hyacinth St. Cyr, who, about 1788, took possession of the two lots, and continued to cultivate the front thereof, for ten consecutive years, till 1798, '99, when the fence having been destroyed, the lots remained open till 1808. St. Cyr claimed in virtue of a parol sale by Madame Chancellier to him, after the adjudication, by his possession delivered to him by the local officer, charged with the supervision of the common field lots of the village, agreeable to the local laws, its usages and

customs, conformable to the laws of Spain, together with his uninterrupted cultivation as aforesaid.

2. By two deeds, one from Kiersereau, the other from Gamache, both dated 23d October 1793, both originals, found among a great number of deeds in the ancient archives of the country, delivered and handed over to the recorder of St. Louis county, after the cession in 1803, and both executed by the parties, in the presence of, and signed by, the governor, with the attestation of two witnesses of assistance. Each deed conveys the lot owned by the grantor, with a clause of warranty, reciting St. Cyr as having been in possession *several years; that of Kiersereau being for the consideration of five hundred and twenty-five, and that of Gamache, for three hundred lives; equal to $165 for both. [*433

3. By the following entries on the Land Book, containing the record of the official survey for Rene Kiersereau, "1793; St. Cyr, 1 Arpent;" and the following on the survey of "Joseph Gamache, 1793; St. Cyr, 1 Arpent; name of said Gamache is Baptiste, instead of Joseph;" which entries must be taken to denote, that St. Cyr then claimed the lots under the parties for whom the original surveys were made and recorded.

4. By a judicial proceeding against St. Cyr, as a bankrupt, had before the lieutenant-governor, in his judicial capacity, in 1801, by which the two lots were seized, appraised by sworn appraisers at ten dollars, and sold to Auguste Choteau, as the property of St. Cyr, at the church door, at the conclusion of high mass, for twelve dollars, payable in peltries, at the current price, in April 1802; for which one Sanguinet was security. The whole proceeding in the sale was executed in the presence of the witnesses of assistance (one of whom was the surveyor-general), the appraisers, St. Cyr, the syndic, and the lieutenant-governor, who all signed the proceedings.

5. By the proceedings of the board of commissioners of the United States, for adjusting land-titles in Missouri, in 1809 and 1810, by which it appears, that Choteau filed his claim to these lots in 1806, according to the acts of congress, as the assignee of St. Cyr, assignee of Rene Kiersereau and Joseph Gamache. He produced to the board, the concessions for the same, registered in the *Livre Terrein*, plots of the surveys, copies of the deeds from Kiersereau and Gamache, to St. Cyr, with a certified copy of the proceeding of bankruptcy against him, by which Choteau became the purchaser of the two lots; and that the board, consisting of Mr. Penrose and Bates, confirmed the lots to Choteau, according to the recorded surveys in the Land Book, No. 2, folio 11.

6. By a deed from Auguste Choteau to the defendant, dated in January 1808, conveying him the two lots in question, for the consideration of $450.

7. By the confirmation of the rights, titles and claims to town or village lots, out-lots, common field lots and commons, adjoining or belonging to the town of St. Louis and others, which have been inhabited, cultivated or possessed, prior to the 20th December 1803, *to the inhabitants thereof, according to their several right or rights in common thereto. [*434

8. By the actual continued possession of the two lots, by the defendant, from 1808 till the trial, as then admitted by the plaintiff.

Waiving, at present, the question which arose below, as to the identity of the Gamache who conveyed to St. Cyr in 1793, with the Gamache who was the owner of the lot, on account of the name of "Joseph Gamache,"

being in the granting part of the deed, and the mark of "Baptiste Gamache" at the foot, with the mark of Hyacinth St. Cyr, as has been done in relation to the similar objection to the deed from M. M. Robillar to Chancellier, in 1781, we are clearly of the opinion, that the title of the defendant must be held valid, unless the plaintiff has sustained some of his objections thereto, by the law, or the facts of the case, as they appeared from the evidence, on which the instructions of the court must be taken to be founded, as the subject matter, to which a reference is necessarily made by the counsel in the court below.

When this cause was before us in 1832, it was decided on the case as made out by the plaintiff on the trial; the defendant offered no evidence; and neither court did nor could decide on the rights of the parties, as they may depend on the record, written and parol evidence, presented for consideration in the present record. Had this case been identical with the former, as to the merits, we should have followed the deliberate opinion delivered therein; but as one judgment in ejectment is not conclusive on the right of either possession or property in the premises in controversy, the plaintiff has a right to bring a new suit; and the court must consider the case, even if it is in all respects identical with the former; though they may hold it to be decided by the opinion therein given. It is otherwise, when the second case presents a plaintiff's or defendant's right, on matters of law or fact, material to its decision, not appearing in the record before; it then becomes the duty of the court to decide all pertinent questions arising on the record, in the same manner as if the case came before them for the first time, save such as arise on evidence identical as to the merits. In this case, we deem it a peculiar duty, enjoined upon us by the nature of the case, the course of the able and learned arguments as to the law of Spain and her colonies, in its bearing on the interesting question before us; together with a view of the consequences of our final decision thereon. Were we to leave any questions undecided, which fairly arise on the record, or to *decide the cause on points of minor importance only, the value of the premises would justify future litigation; which no court of chancery might think proper to enjoin, so long as new and material facts could be developed, or pertinent points of law remained unsettled.

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There is another consideration, of imperious consequence, in relation to the rights of property claimed by virtue of public or private grants, of sales by judicial process, by formal deeds, or informal writings, by parol agreements, or by possession alone, for long time, in all parts of the country; especially, those new and flourishing, and most emphatically, when the property was originally held under the laws and usages of a foreign government; and above all, in such a case as this.

By the record evidence before us, of judicial sales, which, by the admitted laws of Spain, transfer to the vendee both title and possession, in virtue of adjudication, which, after the lapse of fifty-one years after one such sale, and thirty-seven of the other, we must, on every principle of law take, as importing absolute verity, in all things contained in such record, and not suffer it to be questioned. It appears by a record thereof, that the right of Chancellier was sold in 1787, for $32.60; and of St. Cyr, in 1801, for $12; the aggregate of both sales being only $44.60, a sum not sufficient to pay the printing in this case. What the value of the premises now is, or may

be in future, cannot well be known; but as the law of this case is the law of all similar ones now existing, or which may arise, it is our plain duty to decide it on such principle. That while we do, as the law enjoins, respect ancient titles, possession and appropriation, give due effect to legal presumptions, lawful acts, and to the general and local laws, usages and customs of Spain and her colonies, we do not adjudge a title to be in either party, which rests on acts incompetent to vest, transfer or hold property, in opposition to that party in whom the right exists, by the laws of the land, and established rules and principles, which vest property and regulate its transmission and enjoyment.

The state in which the premises are situated was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United States by the treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it (2 Pet. 301, &c.); by which this government put itself in place of the former sovereigns, and became invested with all their rights, subject to their *concomitant obligations to the inhabitants. 4 Pet. 512; 9 Ibid. 734; 10 Ibid. 330, 335, 726, 732, 736. Both were regulated by the law of nations, according to which the rights of property are protected, even in the case of a conquered country; and held sacred and inviolable, when it is ceded by treaty, with or without any stipulation to such effect; and the laws, whether in writing, or evidenced by the usage and customs of the conquered or ceded country, continue in force till altered by the new sovereign. 8 Wheat. 589; 12 Ibid. 528, 535; 6 Pet. 712; 7 Ibid. 86–7; 8 Ibid. 444, 465; 9 Ibid. 133, 734, 747–9; Cowp. 205, &c.; 2 Ves. jr. 349; 10 Pet. 305, 330, 721, 732, &c. This court has defined property, to be any right, legal or equitable, inceptive, inchoate or perfect, which, before the treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign "with a trust," and make him a trustee for an individual, according to the law of nations, of the sovereign himself, the local usage or custom of the colony or district; according to the principles of justice, and rules of equity. 6 Pet. 709, 714; 8 Ibid. 450; 9 Ibid. 133, 144, 737; 10 Ibid. 105, 324, 331, 335–6. The same principle has been applied by this court, to the right of a Spanish town, as a municipal corporation. 10 Ibid. 718–36 *passim*, 144, 734, 736; Ibid. 105, 324, 331, 335–36. See also, 1 Ves. sen. 453; 2 Bligh P. C. (N. S.) 50, &c. [*436

This court has also uniformly held, that the term *grant*, in a treaty, comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession (*vide* the cases last cited), 8 Pet. 466–7; 9 Ibid. 152, 170; 10 Ibid. 331–40; S. P. Ibid. 718, &c.; and that in the term *laws*, is included custom and usage, when once settled; though it may be "comparatively of recent date, and is not one of those to the contrary of which the memory of man runneth not, which contributed so much to make up the common-law code, which is so justly venerated." 9 Wheat. 585. Its evidence consists in the sense and understanding of parties in their contracts, which are made with reference to such usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract, and it rests on the same principle as the *lex loci*. "All contracts are to be governed by the law of the place

where they *are to be performed; and this law may be, and usually is, proved as matter of fact." The rule is adopted for the purpose of carrying into effect the intention and understanding of the parties (9 Wheat. 588; S. P. 12 Ibid. 167–8, 601; 5 Ibid. 309; 6 Pet. 715, 771; 8 Ibid. 372; 9 Ibid. 734–5; 10 Ibid. 331, 712, 724–30); as universally understood and admitted (9 Ibid. 145) by the people of the vicinage (5 Wheat. 384); as considered by the public for years (10 Pet. 722; 11 Ibid. 53); and a right so acquired is as inviolable as if it were founded on a written law. 9 Ibid. 145. It exists by a common right, which means a right by common law; which is called right, and sometimes common right, or the laws and customs of England, the statutes and customs of the realm; and what is properly the common law, is included within common right. Co. Litt. 142 *a*, *b*. It is so called, because it exists in all the subjects, by the common law and universal custom; and is thus distinguished from the same right, claimed by a local custom, in favor of the inhabitants of a particular place (6 Pet. 715); and by an exclusive private right, in one or more individuals, by a prescription in their own favor. Co. Litt. 113 *b*.; Wood's Inst. 4, 6; 7 Day's Com. Dig. 93; 1 Bl. Com. 75, 263. The common right of the subject existed before any prescription (Mo. 574–5; 2 Wils. 299); it must be set up as such, and not by prescription (Willes 265): "for a man shall not prescribe in that which the law of common right gives" (Noy 20); for the common law is the best and most common birthright that the subject hath, for the safeguard and defence of his rights of person and property. Co. Litt. 142 *a*.

Every country has a common law of usage and custom, both local and general, to which the people, especially those of a conquered or ceded one, cling with more tenacity than to their written laws, and all sovereigns respect them. The people of Kent contended with the conqueror of England, till he confirmed their local customs and tenure, which continue to this day; and history affords no instance where the people have submitted to their abrogation without a struggle; as was the case in Louisiana, when they found that the laws of France and the custom of Paris were about to be superseded by those of Spain. See 1 Partid. Preface; White 205.

No principle can be better established by the authority of this court, than "that the acts of an officer, to whom a public duty is assigned by his king, within the sphere of that duty, are *primâ facie* taken to be within his power." "The principles on which it rests, are *believed to be too deeply founded in law and reason, ever to be successfully assailed. He who would controvert a grant executed by the lawful authority, with all the solemnities required by the law, takes on himself the burden of showing, that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud." 8 Pet. 452–5, 464; 9 Ibid. 134, 734–5; S. P. 6 Ibid. 727, &c., and cases cited; 10 Ibid. 331; 1 Paine 469–70. The same rule applies to the judicial proceedings of local officers, to pass the title of land, according to the course and practice of the Spanish law in that province (West Florida). 8 Pet. 310. Where the act done is contrary to the written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein; and according to some order known to the king and his officers, though not to his subjects. 7 Pet. 96;

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8 Ibid. 447, 451–6; "and courts ought to require very full proof, that he had transcended his powers, before they so determine it." Ibid. 464; 9 Ibid. 734. In following the course of the law of nations, this court has declared, that even in cases of conquest, the conqueror does no more than displace the sovereign, and assume dominion over the country. 7 Pet. 86; 10 Ibid. 720, 729–30, *passim*. "A cession of territory is never understood to be a cession of the property of the inhabitants. The king cedes only that which belongs to him; lands he had previously granted, were not his to cede. Neither party could so understand the treaty; neither party could consider itself as attempting a wrong to individuals, condemned by the whole civilized world. 'The cession of territory' would necessarily be understood to pass the sovereignty only, and not to interfere with private property." Ibid. 87. No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would, without express stipulation, have conferred, would seem to be admissible further than its positive words require. "Without it, the title of individuals would remain as valid under the new government, as they were under the old; and those titles, at least, so far as they were consummate, might be asserted in the courts of the United States, independently of this article." Ibid. 88; 6 Ibid. 741–2; s. p. 9 Ibid. 133.

The terms of a treaty are to be applied to the state of things then existing in the ceded territory (6 Pet. 462); in that which had been held by Spain, the whole power of granting and confirming titles had, by the royal order of 1754, been transferred to officers in the colonies, *the commandants of posts, and local authorities, who acted in their discretion, as the sole judges of the matter, condition or consideration, in, on or for which they conferred the right of property, as officers and competent authorities to exercise the granting power. Such officers were in all the colonies; they made grants of all grades of title, as well in rewards for services, as favors, or for the benefit of the country, as they pleased; being persons authorized by the king to grant lands, "he was not willing to expose the acts of his public and confidential officers, and the title of his subjects acquired under those acts, to that strict and jealous scrutiny, which a foreign government, interested against their validity, would apply to them, if his private instructions or particular authority were to be required in every case; and that he might therefore stipulate for that full (evidence) to the instrument itself, which is usually allowed to instruments issued by the proper officer." 8 Pet. 449–58, 475, 488–9; 7 Ibid. 96; 9 Ibid. 134, 169, 734; 10 Ibid 331; s. p. 6 Ibid. 727, &c.; White's Comp. Sp. Laws, 218, 249. Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. 8 Pet. 451. No such disavowal has ever been known to the court, in any of the numerous cases which have been before us, arising under the treaties of 1803 and 1819; and the assiduous researches of Mr. White have brought none to his knowledge (8 Pet. 458; 10 Ibid. 332; White's Comp. 9); from which it may be reasonably presumed, that none exists. [*439

Treaties are the law of the land, and a rule of decision in all courts. 2 Pet. 314; 9 Ibid. 133. Their stipulations are binding on the United States; in that of 1819, there is a present confirmation of all grants made before January 1818, with the exception of only three, which had been

previously made, and were expressly omitted, on which this court make these remarks. "While Florida remained a province of Spain, the right of his Catholic Majesty, acting in person or by his officers, to distribute lands according to his pleasure, was unquestioned. That he was in the constant exercise of this right, was well known. If the United States were not content to receive the territory, charged with titles thus created, they ought to have made, and they would have made, such exceptions as they deemed necessary. They have made these exceptions. They have stipulated that all grants made since the 24th of January 1818, shall be null and void. *440] The American government was content with the *security which this stipulation afforded, and cannot now demand further and additional grounds. All other concessions made by his Catholic Majesty, or his lawful authorities, in the ceded territories, are as valid as if the cession had not been made." 8 Pet. 463–4; s. p. 9 Ibid. 734; 6 Ibid. 741–2; 7 Ibid. 88. By the treaty of 1803, there was a stipulation, *inter alia*, that the inhabitants of the ceded territory shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess; as to which, this is the language of this court. "That the perfect inviolability and security of property is among these rights, all will assert and maintain." 9 Pet. 133; s. p. 10 Ibid. 718, 722, 736. What was to be considered as property, under this stipulation, was, as held in *Smith* v. *United States*, to depend on this question, "whether, in the given case, a court of equity could, according to its rules, and the laws of Spain, consider the conscience of the king to be so affected, by his own, or the acts of the lawful authorities of the province, that he had become a trustee for the claimant, and held the land claimed, by an equity upon it, amounting to a severance of so much from his domain, before the 10th of March 1804, in Missouri, and the 24th of January 1818, in Florida; the periods fixed by the law (of congress) in one case, and the treaty, in the other." 10 Pet. 330–31; s. p. Ibid. 722, 736.

It is next in order to consider, what were the laws of Spain as to the disposition of the royal domain, in Louisiana, while she held it. By the royal ordinance of 1754, it is ordained, for the reasons set forth in the preamble: 1. That from the date thereof, the power of appointing sub-delegates for selling lands, and the uncultivated parts in the king's dominions, shall belong exclusively to the local authorities, being his officers in the colonies. 8 Pet. 451. 2. The officers to whom jurisdiction for the sale of lands shall be sub-delegated, shall proceed with mildness, gentleness and moderation, with verbal, and not judicial, proceeding, in the case of lands possessed by the Indians, or which they may require for labor, tillage, &c. 3. In regard to the lands of communities, and those granted to the towns, for pasturage and common, no change shall be made; the towns shall be maintained in possession of them; those seized shall be restored, and their extent enlarged according to the wants of the population; nor shall severe strictness be used towards those persons who are in possession according to the requirements of the laws. 4. Those who have been in possession of lands, *441] by acts not *confirmed before 1700, may retain free possession thereof, without molestation. If persons have not warrants, their proof of long possession shall be held as a title by prescription. If they have not cultivated

the lands, three months shall be given, or whatever time may be thought sufficient; and notice shall be given, that if they fail to cultivate the lands they shall be given to those who shall lodge information thereof, under the same condition of cultivating them. White's Comp. 50–51. Towns may be founded on prescribed conditions, for which definite rewards are given. White's Comp. 34, 59. The founder shall contract to grant to each person who joins the settlement, building lots and pastures, and lands for cultivation, proportionate to what he will agree to improve. White, No. 62. A town containing ten married men, with an extent of territory proportioned to what is stipulated, may elect from among themselves, ordinary *alcaldes*, and officers of the council. White, No. 63. The territory granted to the founder of a settlement, shall be thus distributed. They shall lay out for the site of the town, whatever may be necessary sufficient *exidor*, and abundant pasture for the cattle of the inhabitants, and as much besides for that which shall belong to the town *proprios*. Of the balance of the tract, the founder to have one-fourth, and three-fourths to be equally divided among the settlers. White, No. 66. The lots to be distributed by lot among the settlers, beginning with those adjoining the main square, the remainder to be reserved to the king, to give as rewards to new settlers or otherwise, at his will, and a plot of the settlement to be made out. White, No. 67. Commons shall be reserved, and the remainder laid out for cultivation, in tracts equal in number to the town lots, to be drawn by lot. White, No. 70. If accident should prevent the completion of the settlement, in the term prescribed, the settlers shall incur no forfeiture or penalty, and the governor of the district may extend the term, according to the circumstances of the case. White, No. 73. There shall be distributed among the settlers of the villages, lots and lands, varying in size and extent, according to their rank and merit, and after living and laboring therein four years, they may sell them as their own property. White, No. 74. No person shall have lands in one settlement, if they possess lands in another, unless they have left their former, and removed to their new residence, or resided in the first for the four years necessary to entitle them to the fee-simple right, or have relinquished it for not having fulfilled their obligations. White, No. 75. *The lots shall be built upon, the houses occupied, the arable lands divided, cleared, worked and planted, and those destined for pasture, [*442 stocked, within a limited time, or the grants shall be forfeited, with a penalty White, No. 76. The distribution shall be made by the governors, under the advice of the council of the villages. White, No. 78. (*Vide* Document of 1772.) All to whom lands shall be distributed, shall, within three months, take possession, &c., under penalty of forfeiting the land, that it may be vacated and forfeited to some other settler; so as to the settlements and improvements they may hold within the villages. White, No. 81. See also, 1 Partidas 123; 2 Ibid. 338–9, 373, 440. (*a*)

(*a*) Definition of *regimiento*, *regidor*, *alcaldes*, &c., in the laws of the Spanish empire of the Indies.

In the administration of the laws, in civil and criminal matters, and the regulation of the police, the settled territories of the Spanish empire of the Indies were divided into a number of sections, different in extent; over each of which was placed a royal officer, appointed for a limited period, by the supreme council of the Indies. The

*For the purpose of ascertaining what lands belonged to the king, it was ordered, that the owners of land should exhibit to the officers
*444] *appointed for the purpose, their titles to lands, estates, huts and *cabellerias;* who, after confirming the possession of such as hold

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larger sections were termed provinces, or more properly *gobernaciones* or governments, and were superintended by governors, who were also, in many parts, commandants and captains-general, that is to say, exercising military and political sway. The sections of lesser extent, but often of great importance, from comprising some capital or other large city, were termed *corregimientos*, and their chiefs were called *corregidors*. The smallest or least important of these separate jurisdictions were placed under the direction of an *alcalde mayor*. In places in which resided an *audiencia*, or high court of justice, the president was sometimes the administrator in chief of the law and police.

The seats of administration, or capitals of these divisions, were generally the largest towns in them, from which the section in almost every instance took its name. In every capital of a jurisdiction, was a council called the *ayuntamiento* or *cabildo;* the *ayuntamiento* is, strictly speaking, the council, and the *cabildo*, the place of its meeting; the two words are, however, indifferently used to convey both significations. This municipal council was composed, in the first place, of a number of *regidores*, never exceeding twelve, who composed the *regimiento;* the office of *regidor* was held for life; that is to say, during the pleasure of the supreme authority; in most places, it was purchased; in some cities, however, the *regidores* were chosen by persons of the district, who were allowed to vote, and were styled *capitulares*. In places in which no governor resided, the *regidores* chose, for two years, one or two persons who were not in the employ of the government, as *alcaldes ordinarios*, or magistrates who held their courts and administered justice, in all the cases in which a governor could decide; they had seats and votes in the *ayuntamiento*, except when a governor or *corregidor* happened to be present. The chief of the district had a seat, but no voice in the *ayuntamiento;* the standard bearer, or *alfarez*, had of right a pre-eminent place and a vote. Thus the *ayuntamiento* or *cabildo* consisted of the governor, *corregidor* or *alcalde mayor* of the place, the *alfarez*, the *alcades ordinarios*, and the *regimiento*, or body of *regidores*.

The word syndic does not appear in the *recopilacion* or official compilation of the laws of the Indies. The Spanish dictionary of the academy, and the French authors on jurisprudence, agree in defining it to mean the person charged with the care, defence and advancement of the interests of a community. In France, at present, the trustee who holds the property of a bankrupt, is styled *le syndic*.

With regard to the words *propios* or *proprios*, *exidos* or *egidos* and *depesas*. When a town was founded in Spanish America, certain portions of ground, termed *propios*, were laid off and reserved as the inalienable property of the town, for the purpose of erecting public buidings, markets, &c., or to be used in any other way, under the direction of the municipality, for the advancement of the revenues or the prosperity of the place. There were also reserved in the vicinity, certain spaces of ground for commons or public pasturage, which were called *depesas;* and vacant spaces for exercise, and for thrashing corn or other general uses, called *exidos*. The difference between *propios* on the one hand, and the *depesas* and *exidos* on the other, was, that the latter were intended for specific purposes, and could not be appropriated to any others; while the municipality might convert the *propios* to the uses which it should judge most convenient.

With respect to the measures of ground called *fanegas* and *huebras*. The dictionary of the Spanish academy, the highest authority on the mere signification of words in that language, defines a *fanega* to mean as much ground as a *fanega* (a measure equivalent to a little more than a bushel and a half) of wheat will serve to sow; adding, that it is generally considered equal to four hundred *estadales* (or spaces of eleven

the same by virtue of good and legal titles, or by a just prescription, shall restore the remainder. White, No. 84. Officers were ordered not to alter the acts of their predecessors with regard to lands admitted to composition, and to leave the holders thereof in quiet possession; and those who have encroached, and held more than they are entitled to, shall be allowed to pay

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Spanish feet) square. Kelly, in his Cambist, makes a *fanega* or *fanegada* equal to 5500 square yards, or about an acre and a third. The *huebra* is designated by the same dictionary as being as much ground as two oxen can plough up in a day.

On the subject of *caballerias* and *peonias*, I can only give my translation of the law defining them.

Translation of Law 1st, Title 12th, Book 4th, of the Recopilacion de Leyes des Indias. Madrid 1781.

That lands and lots are to be given to new settlers, and Indians to be assigned to them; and what are meant by *peonia* and *caballeria;* D. Fernando V., in Valladolid, June 18th, and August 9th, 1513, ch. I. The emperor, D. Carlos, on the 28th of June 1523, and in Toledo, on the 19th of May, 1525. D. Philip the Second, in his chapter of Instructions at Toledo, May 25th, 1596.

In order to encourage our vassals in the discovery and settlement of the Indies, and that they may live with that comfort and convenience which we desire (for them): It is our will, that houses, building-lots, lands, *caballerias* and *peonias* may be and shall be assigned to all who may go as settlers of new lands, in the villages and towns to which they may be directed by the governor of the new settlement, making a distinction between gentlemen of family, and laborers, and those of lesser degree and worth; and that these (houses, &c.) may be increased in extent and in quality, according to the services of such settlers, in order that they may attend to the cultivation of the soil, and to raising of cattle; and after they shall have dwelt and labored on these (houses, &c.) and resided in the said settlements four years, we grant them power, thenceforward, to sell and otherwise use them, agreeably to their own will, as their own property; and likewise agreeably to their quality, the governor or whoever may hold our faculty, may (or shall) assign Indians to them, in the distribution which he may make, in order that they may avail themselves of the term of service, and the proficiencies of such Indians, according to the rates and rules established.

The same Ordinance, 104, 105 and 106, on the subject of settlements.

And as it may possibly happen, that in the assignment of the lands, there may be doubts with regard to measures: We declare, that a *peonia* comprises a lot fifty feet wide, and a hundred long; a hundred *fanegas* of land for cultivation of wheat or barley; ten of Indian corn; two *huebras* of land for a garden, and eight for planting other trees growing in drier land; pasture ground for ten breeding sows, twenty cows, five horses, a hundred sheep, and twenty goats. A *caballeria* is to consist of a lot one hundred feet wide by two hundred long, and in all other respects equal to five *peonias*; that is to say, five hundred *fanegas* of ground for cultivation of wheat or barley, fifty of Indian corn; ten *huebras* of land for garden; forty for other trees growing in more barren land; pasture ground for fifty breeding sows, a hundred cows, twenty horses, five hundred sheep, and a hundred goats. And we order, that the assignment be made in form, so that all may participate in the good and the middling, and in that which is neither, as regards the portion to be allotted to each.

According to the dictionary of the Spanish academy, a *peonia* means the portion granted to a foot soldier of spoils taken, or lands conquered in a war; and a *caballeria* is a portion granted on such occasions to a horse soldier. By the above law, it would seem, that gentlemen or persons entitled to bear arms (*escuderos*) were to be allowed the share of a horseman, and persons of lower degree were to share as foot soldiers. The *fanega* appears to be strictly a measure, without any reference to the quantity of seed to be sown on the ground; and so does *huebra*.

a moderate composition, and new titles shall be issued to them. Where titles to land have been issued by officers who were not authorized, and have been confirmed in council, the holders of letters of confirmation are ordered to retain them, that they may be confirmed in their possession within the limits prescribed; and as regards their encroachments beyond the limits, they are entitled to the benefits of this law. White, No. 85.

Those things which the king gives to any one, cannot be taken from him by the king, or any one else, without some fault of his; he shall dispose of them at his will, as of any other things belonging to him. White, 82, No. 11. When the justices and *regidores* of a *city, town or village, have made, and continue to make, ordinances for their officers and functionaries, and superintendents of the limits and commons in the country, as for other matters which are of the resort of the judiciary and *regidores* (or *capitulores*), the auditors and *alcaldes* are not to interfere therein, except by appeal, and in case of damages. White, 83. No grants shall be made of the rights, revenues or municipal domains of villages; and all grants thereof made by the king, shall be void. Ibid. See 10 Pet. 720, 724, &c. There shall be commissioners in each village, to superintend the affairs thereof, connected with the municipal taxes and domains, and the management thereof, to be composed of *alcaldes* and *regidores;* and, if thought proper, of the general-attorney and recorder (*procurado sindico general*). Where there are no municipal taxes, these commissioners shall attend to the best management of the municipal domains; and where there are such taxes, of both. White, 88. The superintendent of the settlement shall select the tracts, and locate the houses of the settler; if any part of the tract belonging to the settlement is proper for irrigation, it shall be proportionably distributed; each settler shall open the channels for irrigation, and contribute equally to their repairs. White, 105. Land-marks shall be erected between each lot, trees planted along the dividing line, a record of distribution among the settlers shall be made, containing the number of tracts, the names of the settlers to whom allotted, giving each a sheet or plot of his tract, which shall be his title in future, to remain in his possession, to be consulted without the necessity of resorting to the record itself. White, 106, pp. 40, No. 81.

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These are some of the many royal orders which relate to the general domain of the king, and to settlements or villages, in each of which there were municipal councils and officers, who made and executed their regulations of police. 10 Pet. 723, 4. One branch of which was confided to a *syndic regidore*, or other supervising officer, to enforce the village ordinances. White, 108–13, 115–16. These, with the regulations of the local officers of the king, composed the written law of the colony or village, accordingly as the subject-matter thereof was general or local; besides which, there was an unwritten law of three kinds. "Use, custom and the common law." Use is defined to be "that which has arisen from those things which a man says and does, and is of long continuance, and without interruption;" the requisites to the validity of which are prescribed. "Custom is the law or rule which is not written, *and which men have used for a long time, supporting themselves by it in the things and reasons with respect to which they have exercised it: on which definition are founded three axioms." I. "That custom is introduced by the people, under which name

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we understand the union or assemblage of persons of all description, of that country where they are collected. 2. That it derives its authority from the express or tacit consent of the king. 3. That once introduced, it has the force of law. To establish a custom, the whole, or greater part of the people ought to concur in it. Ten years must have elapsed among persons present, and twenty at least among persons absent. In default of this continuance, it shall be proved by two sentences of judges, or judgments given upon or according to it; one sentence suffices, when given on a question whether that custom exists, and the judge determined that it did." Customs are general or particular; the latter respects a specific thing, a particular person or place; or with respect to the whole, of certain persons or places; general, with respect to specific acts of all the inhabitants of the kingdom, and may destroy the law; but a particular custom in any province or seignory, has only this effect in that district or part where it hath been exercised. "A *fuero* (forum) is a use and custom combined, and has the force of law." White 60–1.

Such are the laws, usages and customs of Spain, by which to ascertain what was property in the ceded territory, when it came into the hands of the United States, charged with titles originating thereby; creating rights of property of all grades and description. In the treaty of cession, no exceptions were made, and this court has declared, that none can thereafter be made. 8 Pet. 463. The United States must remain content with that which contended them at the transfer, when they assumed the precise position of the king of Spain. The United States have so remained, as appears by their laws. By the acts of 1804 (2 U. S. Stat. 287); of 1805 (Ibid. 324); of 1807 (Ibid. 440); of 1816 (3 Ibid. 328); they recognised the laws, usages and customs of Spain to be legitimate sources of titles; and, by the act of 1812 (2 Ibid. 748), confirmed to the inhabitants of St. Louis, and other villages, according to their several right or rights of common thereto, the rights, titles and claims to town or village lots, out-lots, common field lots, and commons, in belonging or adjoining to the same, which titles depended on parol grants and local customs.

The same recognition extended to grants to actual settlers, pursuant to such laws, usages and customs; to acts done by such settlers *to obtain a grant of lands actually settled, or persons claiming title [*447 thereto, if the settlement was made before the 20th December 1803. Such claims, when made in virtue of a warrant or order of survey, or permission of the proper Spanish officer, were confirmed, if actually inhabited and cultivated on that day (2 U. S. Stat. 324), and the permission shall be presumed on proof of a continual habitation and cultivation for three years prior to the 1st October 1800, though the party may not have it in his power to produce sufficient evidence of such permission. (Ibid. 391.) Thus connecting the law of nations, the stipulations of the treaty, the laws, usages and customs of Spain, the acts of congress, with the decisions of this court, we are furnished with sure rules of law, to guide us through this and all kindred cases, in ascertaining what was property in the inhabitants of the territory when it was ceded. As all the supreme laws of the land, the constitution, laws and treaties, forbid the United States to violate rights of property thus acquired, so they have never attempted it; but the state of the province required that some appropriate laws should be passed, in order to ascertain

what was private, and what public property, to give repose to the possession, security to titles depending on the evidence of facts remote in time, difficult of proof, and in the absence of records or other writings. These facts, too, on which the law of usage and custom, the transmission of property by parol, the performance of acts *in pais*, on which the right depended, were to be developed from the few survivors of the settlers of an ancient village, of whom, as appears from the record, but few could read or write; whose occupations were in the trade with Orleans, Machinau and the Indian tribes, who attended little to village concerns, and still less to village property, when, on a public sale, its price was eight cents an arpent; and what would now be a splendid fortune, would not, fifty years ago, be worth the clerk's fee for writing the deed which conveyed it, and was, therefore, passed from hand to hand by parol, with less formality than the sale of a beaver skin, which a bunch of wampum would buy. The simple settlers of St. Louis then little thought that the time would ever come, when under a stranger government, the sales of their poor possessions, made in the hall of the government, at the church door, after high mass, entered on the public archives, as enduring records of their most solemn transactions, would ever be questioned by strict rules of law or evidence. Still less did such a race of men as the boatmen and hunters of the west, who, by mutual agreement, *448] gave one thing, and took another, whether *land or peltry, on a fair exchange, by a shake of the hand, ever imagine that a common field lot would ever be worth, when lying waste, a pack of furs, or that no evidence of its sale would be admissible, on a question of whose it was, unless by deed. When there was but one Kiersereau and one Gamache in the village, it was little dreamed of, that a principality in value, would depend for its ownership, on the question, whether the one wrote his name Kirceraux or Kirgeaux, or to the mark of the other was affixed the name of Joseph Batis, or J. B. Gamache. Well was it said by one of the witnesses at the trial, "there were few people; it was not as it is now."

Congress, well aware of the state of the country and villages, wisely and justly went to the extent, perhaps, of their powers, in providing for the security of private rights, by directing all claimants to file their claims before a board, specially appointed to adjust and settle all conflicting claims to lands. They had in view another important object; to ascertain what belonged to the United States, so that sales could be safely made, the country settled in peace, and dormant titles not be permitted either to disturb ancient possession; to give to their holders the valuable improvements made by purchasers, or the sites of cities, which had been built up by their enterprise. See 10 Pet. 473. Accordingly, we find, that by various acts, the time of filing such claim is limited; after which they are declared void, so far as they depend on any act of congress; and shall not be received in evidence in any court, against any person claiming by a grant from the United States. (2 U. S. Stat. 327, 391, 440, 617, 662.)

These are laws analogous to acts of limitations, for recording deeds, or giving effect to the awards of commissioners for settling claims to land under the laws of the state; the time and manner of their operation, and the exceptions to them, depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which calls for their enactment. Reasons of sound policy have

led to the general adoption of laws of both descriptions, and their validity cannot be questioned. Cases may occur, where the provisions of a law may be such as to call for the interposition of the courts; but these under consideration do not. See 3 Pet. 289–90. They have been uniformly approved by this court, in 12 Wheat. 528–29, 537–43, 601–2; 6 Pet. 771–2; 7 Ibid. 90–3, *passim;* and ought to be *considered as settled rules of decision in all cases to which they apply. [*449

Having reviewed the written law of the case, we must next examine what was the unwritten law of the place, which can appear only from the evidence on the record, as to the usage, custom, or *fuero*, and is most manifest. 1. In the most solemn act of 1772, by the two governors, in the presence of all the officers of government, the people of the village, and recorded together with all proceedings under it at large, in the land-book of the district, with the surveys entered on sixty-eight pages. What those proceedings were, will appear in the document before referred to, in general, and the copies from the entries in the land-book, in relation to each lot, contained in the record. 2. In the deeds executed in the presence of the governor, and witnesses of assistance specially selected to attest the sale; as by the common law they were called to attest the livery of seisin on a feoffment (8 Cranch 244, &c.); and the entries of the names of the purchasers in the margin of the survey of the property sold, recorded in the land-book of the village. 3. In the adjudications made by the governor in a judicial capacity, making a sale of the property of Chancellier and St. Cyr, by judicial process, set out at length on the record, and most solemnly attested. 4. By the evidence in the record, showing beyond doubt, that there has been an universal acquiescence by the political authorities of the district, the municipal council and officers of the village, as well as the inhabitants, in all these acts, testified by the quiet possession held under them from 1772.

The document of that year is not only to be considered as the ancient muniment of the the titles of the villagers, but as an authentic and conclusive recognition of the local custom, in relation to some important facts, illustrating the local law of the place, when taken in connection with the testimony of the witnesses. In that solemn act, there is this clause, "to serve to designate the various tracts of land, granted in the name of the king (of Spain) to the inhabitants of this post of St. Louis, as well by title (deed) as by verbal consent, by the chiefs who have governed them from the foundation (of the government) to this moment." In alluding to acts done under the governor of the territory under France, is this clause: "the latter to certify by his signature, in his said quality, and in virtue of the power confided to him, that he had granted, either by title, *(deed) or verbally, the above-mentioned lands, in the name of his majesty" (the king of France). This attests the meaning of the [*450 word *grant*, under both governments, to be inclusive of verbal ones, which were equally valid as those by deed; and as the title passed from the king to the people in this way, so we find, by the uncontradicted testimony of several witnesses, that it passed from one to another in the same way, without writing, when the land was of small value. It appears also, from the evidence, that there was an officer in the village, called by the inhabitants a *syndic*, and in the Spanish laws a *regidore;* whose duty and authority were to see that the common fences of the forty arpent lots were kept in repair

He would direct them to be inspected; and if they were found out of repair, would direct the owner of the lot, in front of which it was defective, to make the repairs: if the owner was on a journey, the *syndic* would have the repairs made, and make the owner pay his share, on his return; otherwise, he would give the land to another person, who would make the share of the fence. This was a regulation in villages, by the authority of the commandant and municipal authorities, in conformity with the laws of Spain (see 10 Pet. 725, 731); it applied as well to village property as to the large grants of the royal domain; and it appears by the regulations of O'Reilly, Gayoso and Morales, that from 1770 till the cession in 1803, it it was of universal application throughout Louisiana. White, 205–16, *passim*.

Such were the laws, usages and customs of Spain, in relation to the grants, transfers and tenure of village property. There remains one other rule which must be applied to this case, unless the evidence in the present record, which was not in the former, may lead to a different result; we mean the opinion of this court, in the case between the same parties, claiming the same property. See 6 Pet. 763–7. Before we consider the instructions on which the plaintiff has assigned his errors, the points decided in that case will be taken in the order of the learned judge, who delivered the opinion of the court.

1. On the handwriting and identity of Rene Kiersereau, who, as alleged was one of the witnesses of assistance to the deed of 1781, from M. M. Robillar, his wife, to Louis Chancellier, as to which the court below had rejected certain depositions, which was assigned for error; and the objection overruled, for this reason: "The record *does not show that the judge was called upon to express any opinion with respect to the legal effect and operation of the deed; or that the plaintiff had not the full benefit of its being his (Kiersereau's) deed. And, indeed, it would seem from the course of the trial, that it was so considered; or at all events, the contrary does not appear from any question presented to the court on the subject." 6 Pet. 768. Had the same question been presented now, as it was then, we should not have hesitated to have expressed an entire concurrence with that view; but as it now comes up on a new state of facts, it deserves further consideration; especially, as a similar question occurs as to the identity of Gamache, who conveyed to St. Cyr in 1793. Both questions are so similar, that they may be taken together in two aspects. 1. As questions of fact. 2. Of law.

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1st. It is admitted, that Rene Kiersereau was the owner of one of the lots in controversy, as is apparent on the document of 1772, to which his name is affixed as one of eleven inhabitants, including the governor, the political and municipal officers of the village, who could write their names, which, according to evidence, contained 250 persons. Whether he was the same person who was the witness to the deed from his wife, and (as we shall assume) the grantor of the lot, was a pure question of fact for the jury, on the whole evidence on that subject; so it was, as to the identity of Gamache, as to whom there is the following admission on the record. "It was also admitted, that Joseph Gamache, for whom the survey of one of the tracts of land, of one by forty arpents, was made, was known as well by the name of Jean Baptiste Gamache, and of Baptiste Gamache, as Joseph

Gamache ;" which also appears by his deed to Chancellier. Mark ⋈ of John Baptiste Gamache, Joseph Gamache, in the survey in the land book. Batis ⋈ Gamache, in his deed to St. Cyr, and Baptiste Gamache, in the margin of the survey. Before the court could give any instruction to the jury, as to the identity of either Kiersereau or Gamache, "they must have been satisfied on that subject, that there was nothing in (the parol) evidence, or any fact which the jury could lawfully infer therefrom," that they were or were not the owners of the respective lots. If there was any evidence which conduced to prove the fact, "the court must assume it to have been proved ; for it is the exclusive province of the jury to decide what facts are proved by competent evidence," to judge of the credibility of the witnesses, and the weight of their testimony, as tending more or less to prove the fact relied on. "As *these were matters with which the court could not [*452 interfere, the right to the instruction asked, must depend on the opinion of the court, on a finding by the jury in favor of the defendant, on any matter which the evidence conduced to prove, giving full credence to the witnesses produced by him, and discrediting those of the plaintiff. *Ewing* v. *Burnett*, 11 Pet. 50–2 ; S. P. *United States* v. *Laub*, 1838, 12 Pet. 1.

2d. In this case, we think that neither question was one of fact entirely; the manner in which the deeds were executed, the possession taken and held under them by Chancellier, of one, and St. Cyr, of the other ; its notoriety to the authorities, and the people of the village, with the nature of the possession, the situation and state of the common field lots, and their cultivation within one common inclosure, regulated by a special police, with the other circumstances of the case (see 11 Pet. 523); incline us strongly to this conclusion. That after this lapse of time, the legal presumption of the validity of both deeds, would attach by the maxim, that in favor of long possession and ancient appropriation, everything which was done shall be presumed to have been rightfully done ; and though it does not appear to have been done, the law will presume that whatever was necessary, has been done. 2 Pet. 760, and cases cited.

2. The next point decided in the former case, was on an objection made by the defendant's counsel, that the plaintiff had not such a legal title as to sustain an ejectment, which was overruled. 6 Pet. 768–9. And we think very properly, in accordance with the leading case of *Sims's Lessee* v. *Irvine*, 3 Dall. 425, 454 ; the authority of which remains unquestioned. It was objected, that the confirmation by the board of commissioners to Choteau was void, because the defendant was, at the time, one of the board, and claimed the property by a deed from Choteau, before the confirmation ; it was overruled, because it did not appear that he sat at the board, at the time. 6 Pet. 768. The same objection has been much pressed now ; with the additional reason, that the defendant was also a judge of the superior court of the territory ; but as the confirmations in the record show that he was not present, and we think the objection not good in law, we fully concur with the decision of this point in the former case. After recapitulating the evidence as it appeared in the then record, the court observed : "From this statement of the case, according to the plaintiff's own showing, there is a regular deduction of title or claim from the persons for whom the

lots were surveyed to the *defendant. But it appears that these persons, Kiersereau and Gamache, sold their claim twice (Gamache one-half); in the first place, to Louis Chancellier, under whom the plaintiff claims; and in the second place, to St. Cyr, under whom the defendant claims. If these title papers were to be considered, independent of the acts of congress, and the proceedings of the commissioners, the plaintiff being prior in point of time, would prevail so far as depended upon the deduction of a paper title, and independent of the question of possession. It becomes necessary, therefore, to inquire how far the acts of congress apply to, and affect any part of these title papers." The court then, referring to the acts of 1805 and 1807, and to the evidence, held, that as there was no evidence that Madame Chancellier had ever filed her claim, or the evidence thereof, pursuant to the law, and the instruction of the court complained of, was on the effect of the confirmation under the law; the plaintiff could derive no benefit from it (6 Pet. 772); which we think was the correct result of the then case. A different case is now presented on this subject.

The plaintiff gave in evidence two opinions of the recorder of land titles of St. Louis county, confirming to the representatives of Gamache and Kiersereau the forty arpent lot of each, and directed each to be surveyed; but did not offer the confirmations to Choteau by the board of commissioners, which were given in evidence by the defendant. The plaintiff claimed under the former, the defendant under the latter; that of the plaintiff will be first considered. By the 8th section of the act of 1812 (2 U. S. Stat. 751), the recorder of land titles was invested with the same powers, and enjoined to perform the same duties, as the board of commissioners (which was then dissolved), in relation to claims which might be filed before the 1st December 1812; and the claims which have been heretofore filed, but not acted on by the commissioners; except that all his decisions shall be subject to the revision of congress. He was directed to report to the commissioner of the land-office, a list of all such claims, with the substance of the evidence in support thereof, his opinion, and such remarks as he may think proper, to be laid before congress at their next session. By the act of 1813, the time for filing claims was extended to 1st January 1814 (Ibid. 807), under which acts, the recorder made the confirmations relied on by the plaintiff, on the 1st November 1815, which was confirmed by the 2d section of the act of 1816. (3 Ibid. 329.) But these confirmations cannot avail the plaintiff as
*454] a claimant under these or any other acts *of congress, for the following reasons: 1. That the authority of the recorder of land titles was, by the express terms of the acts of 1812 and 1813, confined to those claims on which the board of commissioners had not previously acted; from which it follows, that after the commissioners have made a confirmation of a specific claim, the action of the recorder is either merely cumulative, and so inoperative; or if adverse, merely void, as an assumption and usurpation of power in a case on which he had not jurisdiction, and his action must be a mere nullity. Here, the commissioners had decided on the identical claim, in 1809–10; congress had made a general confirmation of all the claims of the then inhabitants of St. Louis, of their title to the common field lots, in 1812, when the defendant was an inhabitant thereof, and in actual possession of those in controversy; and by the act it was provided, that it should not

affect any confirmed claims to the same lands. Surveys were directed to be made, plots thereof made out, and transmitted to the general land-office and recorder of land titles. (2 U. S. Stat. 751.) As the act directed no further steps to be taken, the title became complete, and the recorder thenceforth ceased to have any power over the confirmed lots, save to perform the ministerial acts directed by law as the ordinary duties of his office. If congress could, it never did, give him any authority to supervise either the acts of the commissioners or the confirmations of the law.

We must, then, take the defendant, as one holding the premises in controversy, by a grant from the United States, and as their grantee, entitled to all the protection of the laws appropriate to the case. The unanswerable reasoning in this court, in *Green* v. *Liter*, the principles of law on which it is founded, with the admitted authority with which it has been received, save the necessity of any reference to any other source for its support. 8 Cranch 244–49. That a grant may be made by a law, as well as a patent pursuant to a law, is undoubted (6 Cranch 128) ; and a confirmation by a law, is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*. The plaintiff, therefore, is brought within the two provisions of the laws ; that, by Madame Chancellier not having filed her claim within the time limited by law, she could not set up any claim under any act of congress, or be permitted to give any evidence thereof in any court, against a person having a grant from the United States, under the confirmation of the commissioners, and the act of 1812. The plaintiff has contended, that the act of 1831 has released him *from these provisions, and [*455
all penalties imposed by any act of congress. This act was a supplement to the act of confirmation of June 1812 (2 U. S. Stat. 748) ; by the first section of which, the titles of the inhabitants were confirmed, according to their private right or rights, in common thereto, as has been stated before. By the 2d section, all town, out, and common field lots, included in the surveys therein directed, not rightfully owned or claimed by any individual, or held in common, belonging to the towns or villages, or reserved by the president for military purposes, were reserved to the towns and villages for the support of schools. In order to ascertain what lots were owned or claimed by individuals, the recorder was, by the 8th section, empowered to act on claims filed before 1st December 1813, as has been seen, and those before filed and undecided. The time for presenting such claims was further enlarged by the act of 12th April 1814 (3 U. S. Stat. 121) ; and certain confirmations were made by congress in those acts. Under this authority, the recorder made his report, which appears in the 3d vol. State Papers—Public lands, p. 314. His proceedings were confirmed by the 2d question of the act of April 1816. (3 Ibid. 329.) Then comes the act of 1831, the first section of which enacted, "that the United States do relinquish to the inhabitants of St. Louis, &c., all their right, title and interest to the town or village lots, out-lots, common field lots, and commons in, adjoining or belonging to the towns and villages, confirmed to them, respectively, by the act of 1812 ; to be held by the inhabitants, in full property, according to their several rights therein, to be regulated or disposed of for the use of the inhabitants, according to the laws of Missouri." By the second section, the United States relinquished their right, title and interest in and to the town, out, and common field lots, in the state of Missouri, reserved for

schools by the act of 1812; and provided that the same shall be sold or disposed of, or regulated for the same purposes, in such manner as may be directed by the legislature of the state. (4 U. S. Stat. 435.) It is most obvious, that this act, so far from opening the confirmation of the commissioners, in 1809–10, and of the act of 1812, or relieving the plaintiffs from the effect thereof, is a new confirmation of the private and common rights of the inhabitants, and cannot aid the plaintiff; the purposes of this case do not require us to give it any further consideration. For these reasons, we feel constrained to come to the same conclusion on this record, which the court did on the former; the plaintiff can neither have any benefit from
*456] any act of congress, nor *give evidence of his claim against the defendant, claiming by grant from the United States.

3. The next position of the court in the former case was, that Madame Chancellier having slept upon her claim till 1818, must be considered as having abandoned it; to which we not only entirely assent, as this point appeared then, but as still clearer now, by the new evidence. It was testified at the trial, that Madame Chancellier had made a verbal sale of the two lots to St. Cyr; the credibility of the witness, and the weight of his testimony, were matters exclusively for the jury; and we cannot say, that they did not find for the defendant on that ground; it was competent evidence, conducing to prove that fact; and if the jury found the fact accordingly, we have only to consider its consequences. Assuming, as we must, that the fact of such sale is established, it is immaterial, whether such sale passed the title or not; it was, when taken in connection with the other circumstances of the case, powerful, if not conclusive, evidence, that she had abandoned as well the possession as the right to the lots in controversy, without the intention to reclaim either; that St. Cyr took and held possession in good faith, and with good faith purchased from Kiersereau and Gamache, which he might lawfully do, to complete his title. If it was a fact, then the continued possession of St. Cyr and the defendant, entitled the latter to all the benefit of the Spanish law of prescription, whether of thirty, twenty or ten years, according to the rules laid down, as taken from the Recopilacion and Partidas, in White, 68–9. The destruction of the common fence of the common field lots, in 1798–9, was a sufficient excuse for St. Cyr or Choteau not continuing the actual possession and cultivation of their lots, until the other owners would join in rebuilding the fence. The change of government in 1804, with the consequent uncertainty of titles, was the reason for leaving the lots open, which ought not to be overlooked; that there was no actual or intended abandonment by St. Cyr, might well have been found by the jury, from the judicial sale to Choteau in 1801; or by him, from the sale to the defendant in 1808. On these facts, the laws of Spain would consider the possession as continued from 1798 to 1808; and if the opinions of this court have any bearing on the question of possession, abandonment or legal presumption of a rightful title, those to be found in *Green* v. *Liter*, 8 Cranch 244, &c.; *Barr* v. *Gratz*, 4 Wheat. 213, 233; *Propagation Society* v. *Pawlet*, 4 Pet. 480, 504–6; *Clarke* v. *Courtney*, 5 Ibid. 354–5; *Barclay* v. *Howell*, 6 Ibid. 513; *United States
*457] v. *Arredondo*, Ibid. 743; *Ellicott* v. *Pearl*, 10 Ibid. 442; *Ewing* v. *Burnett*, 11 Ibid. 51–3; *Mitchel* v. *United States*, 9 Ibid. 734–5, 760; *New Orleans* v. *United States*, 10 Ibid. 718–19, &c., are most full and conclusive.

The plaintiffs have relied much on the allegation, that St. Cyr took possession, as the tenant of Madame Chancellier, or her husband, Beauchamp, in 1788, or under an agreement that he should keep up the fence, while he occupied the lots. The only evidence of this fact was by her in her testimony, in which she stated it in general terms; on her cross-examination, she stated that Beauchamp had told her so; whereupon, the court directed the jury to reject her evidence. Whether the jury did so or not, is not material; they were not bound to credit her; they might not believe her; and we cannot presume that they did, or hold that they ought. 11 Pet. 50–1. There is another fact in evidence, which leads to the same results. It was testified at the trial, that St. Cyr was put into possession by the syndic, pursuant to the village regulations, because the fence had not been kept up, after the death of Chancellier. The jury were the judges of this fact; and from their finding, we must presume, that it was proved, and hold the law to be accordingly; that no taint of bad faith can attach to the conduct of St. Cyr, by any notice he may have had of the title or claim of Madame Chancellier; it was consistent with her title, that she should hold it by the established village tenure, subject to the municipal regulations, which were authorized by the laws, usages and customs of the country and place. It is evident, that the law which gave a title in fee to a village lot, by a continued residence of four years in a house, neither did nor could apply to a common field lot, used only for cultivation or pasturage, the owner of which could derive no advantage from his mere right of property, if the adjoining owners did not keep the common fence in repair, or pay the syndic for doing it. That such regulations were authorized by the written law of Spain, in royal orders, and by the unwritten law of use, custom and *fuero*, has been seen, and that such usages and customs were valid; that local usage and custom in relation to municipal regulations, was not the law of the villages only, but of the metropolis of the province, and equally binding as the local law, is clearly established, by the able and unanimous opinion of this court, in *New Orleans* v. *United States*, 10 Pet. 712, 716, 724, 730, 731.

4. Another principle laid down by the court in the former case, *meets our entire approbation; "that the justice and law of the case, growing out of such a length of possession, are so manifestly [*458 with the judgment of the court below, if we look at the whole evidence on the record, that we feel disposed to give the most favorable interpretations to the instructions of the court." 6 Pet. 772.

5. There remains but one other point, on which the court gave their opinion in the former case, which was then made by the plaintiff's counsel in their argument, and has been strongly urged in this case, that the confirmation of the commissioners inured to plaintiff's use. The reasons assigned for this position are, that the only object of the acts of congress being to ascertain what property had been acquired by individuals, before the cession, the commissioners were to act only on original claims, and by confirming the right of the original owner, to leave the derivative right under him entirely open between adverse claimants. The court were before of opinion, that this view of the case could not be sustained; and we are now of opinion, that it is inconsistent with all the acts of congress, which have organized boards of commissioners for adjusting land titles, the proceedings of the board, and the laws which have confirmed them. By these

laws it is provided, that the original grant shall be recorded ; but all other conveyances and deeds shall be deposited with the register or recorder of deeds, to be by them laid before the commissioners. (See 2 U. S. Sat. 327.) The same provision is contained in the numerous laws on the subject, which are noticed and reviewed in the opinions of this court (12 Wheat. 525–43 ; 6 Pet. 718, &c. ; 7 Ibid. 89, 90, &c.) ; showing that this distinction between the evidence of original and derivative rights to land, has been uniformly observed by congress and the court. The confirmations of the commissioners in the present case are to the person who made and proved his claim before them ; and from the reports of all the boards, as published in the State Papers (Public Lands, 3 vol. *passim*), it has been uniformly done, and the acts of congress, confirming them, have been, in general terms of reference, to such reports. (See 3 U. S. Stat. 121, 329.) It would defeat the whole object of these laws, and introduce infinite public mischief, were we to decide that the confirmations by the commissioners and congress, made expressly to those who claim by derivative titles, did not operate to their own use. It has been seen, that the confirmation of titles to village lots in Missouri (2 U. S. Stat. 748), is, in express terms, "to the inhabitants *459] *of the village," according to their "several right or rights in common thereto." So, in the act of 1831, the lots confirmed by the act of 1812, are "to be held by the inhabitants of the said towns and villages in full property, according to their several rights therein." These laws necessarily admit of but one construction ; and if we regard their terms, the object manifest on their face, and the effects evidently intended by congress, the position of the plaintiff's counsel is utterly untenable.

We now proceed to consider the instructions asked by the plaintiff and refused by the court, as well as those given as modifications of those asked by plaintiff, and those given by the court on the prayer of the defendant.

Plaintiff's instructions. 1. That the sale, partition and final decree, relative to the estate of Chancellier, established the title of his wife to the premises in controversy, which the court refused ; but instructed the jury, that they passed the title thereto, such as it was, vested in Chancellier, to her ; to which we think there can be no well-founded objection, as no law was produced by which such a decree could operate as a new grant of a right of property to the vendee. If none existed in the person as whose estate it was so sold, it was a transfer of an existing title, and not in its nature or effect an original grant.

2. That independent of the title of Kiersereau and Gamache, there was sufficient evidence before the jury, to establish a title by prescription in Chancellier and his heirs ; which instruction could not be given without usurping the province of the jury to decide on the sufficiency of the evidence. 9 Pet. 445. No instruction was asked as to its competency; and the one asked was, therefore, properly refused.

3. That St. Cyr took no title by prescription. This was a mixed question of law and fact ; to have given such instruction, would have been an assumption by the court, that there was no such fact legally inferrible from the evidence, which would have brought St. Cyr within the law of prescription. There was not only evidence of such facts given to the jury, but from their finding, we must take the parol sale by Madame Chancellier to him,

the usage and custom of the village to authorize the syndic to put him in possession, and that he was, pursuant thereto, so put into possession, to be facts which would give to his possession the protection of prescription.

*4. If the jury are of opinion, that St. Cyr had notice of the sale to Madame Chancellier, his possession could not be adverse, or an [*460 estate in him by prescription. If St. Cyr purchased from her, or was put into possession of the lots, on account of her default in not repairing the fence, a notice of her claim was a matter of course, and could not impair his right by possession, or the subsequent purchase from Kiersereau and Gamache.

5. That if St. Cyr was a purchaser at the sale of Chancellier's estate, or put his name or mark as such, on the margin thereof, these facts are *primâ facie* evidence, thot he had notice of her title ; to which the court answered, that this was proper evidence for the jury to consider, in deciding whether he had notice, and refused the instruction as asked ; which we think was correct. But on the facts referred to under the third instruction, notice was wholly immaterial, as it could not taint his purchase with fraud.

6. That the deed from Kiersereau to St. Cyr, in 1793, who had before conveyed to Chancellier, by deed on record, conveyed nothing to him, and that the penalties of the crime of *estellionato*, by the Spanish law, were thereby incurred. 7. The same objection is made to the deed to St. Cyr from Gamache. 8. That the deed purported to be a deed of Joseph, and was signed Batis Gamache ⋈ his mark. The foregoing facts fully justify the court, in their refusing such instruction, as to the effect of both deeds ; and as to the deed from Gamache, the only question was one of the identity and fact for the jury ; which reasons equally apply to the 8th, 9th and 10th instructions.

11. That the sale by the syndic of St. Cyr's property, was no evidence of his title to the lots, or that such sale was made. The first part of this instruction was given, and properly, for the reasons given in the first instruction ; the latter part was properly refused, because the proceeding was a judicial one of record, which is, *per se,* evidence of the facts set forth, and cannot now be called in question. 8 Pet. 308, 310.

12, 13 and 16. These instructions depend on the facts of the case, and could not have been given, without interfering with the province of the jury ; the court charged favorably to the plaintiff in part of the 12th and 16th ; that defendant had shown no title or bar to the plaintiff under the act of limitation.

14, 15 and 17. These instructions were founded on the official *situation of the defendant before alluded to, and were properly [*461 refused, under the decision of the court in the former case.

The 18th instruction is founded on the act of 1831, before noticed, which for the reasons heretofore given, could not avail the plaintiff ; and he cannot complain of the refusal of the court to give it as asked ; as they did instruct the jury, that no penal effect resulted from any act of congress, which bars or stands in the way of plaintiff's recovery, though it would have been good ground of an exception by the defendant, had a verdict been found against him.

The 19th, 20th and 21st instructions depended on the court assuming, that the facts relied on by the plaintiff were established by the evidence,

and taking from the jury the right of deciding what facts were proved ; the court were, therefore, right in refusing to instruct as requested.

The instructions asked by the defendant, and given by the court, were founded on the evidence in the cause, relating to the possession of St. Cyr, and those claiming under him ; and the consequent right of the defendant, by prescription, as a bar to the plaintiff's right of recovery. We think they were fully justified by the evidence, especially, with the qualifications laid down by the court, as to the nature of such possession, and of the title under which it was held, as appears in their further instruction to the jury : " That the possession mentioned must be an open and notorious possession, and that if they should find such possession, it gave title under, and according to, the Spanish or civil law, which was in force in Upper Louisiana, at the date of the treaty by which Louisiana was acquired by the United States, and remained in force and unabrogated by any law of the district of Louisiana, or of Missouri, down to a period as late as October 1818. That the possession of ten or thirty years would give a title, the one period or the other, according to the circumstances under which the possession was obtained. That the ten years' possession which would give a prescriptive title, must be a possession under a purchase made in good faith, and where the purchaser believed that the person of whom he purchased had a good title, and where the owner of the title prescribed against, resided in the same country, during the said ten years. That if the jury believe from the evidence, that the possession of St. Cyr, under whom the defendant claims, was obtained under a purchase made by him in good faith, and under the belief that the persons of whom he purchased had a good title, and that the possession of Choteau, under whom the defendant claims, was obtained in like manner, and *under a purchase made with the like belief, and that they had the possession mentioned in the second instruction asked for on the part of the defendant, and that the said Marie Louise was in the country during the said ten years, the plaintiff cannot recover in this action." And further instructed the jury, in relation to the possession mentioned in the third instruction asked for on the part of the defendant : " that to make the possession there mentioned a bar to the plaintiff's recovery in the present action, the possession of the defendant must have been obtained under a purchase, where he believed that the person of whom he purchased had a good title, and that the said Marie Louise was in the country during the said ten years ; which, unless the jury believe, the cannot find for the defendant upon such possession. The rulings appear to be in conformity with the laws of Spain, as extracted from the books of established authority in Mr. White's Compilation, p. 68–71 ; and this court has never laid down stricter, or perhaps as strict, ones, on questions of prescription, which they have decided according to the rules of the common law.

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To the remaining instruction, no exceptions appears to have been taken, and cannot, therefore, be considered ; they were made the subject of a motion for a new trial, and are not cognisable in error. The judgment of the court below is consequently affirmed, with costs.

Catron, Justice.—The plaintiff moved the court to instruct the jury as follows : That there is evidence before the jury, of the possession and title of Rene Kiersereau and Jno. B. Gamache, as absolute owners and

proprietors of the two forty arpent lots described in the declaration. That there is evidence before the jury of the possession and title of Louis Chancellier, as owner and proprietor of the two forty arpent lots in question, as assignee of said Rene Kiersereau and said J. B. Gamache, respectively. That there is evidence of the actual possession, after the death of said Louis Chancellier, by his widow, said Marie Louise, of said two forty arpent lots, claiming the same as absolute owner thereof. That the plaintiff has established his title, as assignee of Marie *Louise Chancellier, to the estate and interest vested in her and her heirs, in and to the forty arpents [*463 in question. That the deed given in evidence by plaintiff, from Auguste Gamache to Bazil Laroque and Marie Louise, his wife, inures to the benefit of the plaintiff. That if the jury shall be of opinion, from the evidence, that Hyacinth St. Cyr originally obtained possession of the lots in question, as tenant of Marie Louise, the widow of Louis Chancellier, or by virtue of a permission to occupy and cultivate, given to said St. Cyr by the syndic of the village of St. Louis, the possession of St. Cyr, so obtained, shall be taken by the jury as in law the possession of said Marie Louise. That the confirmations of the board of commissioners, on 23d July 1810, of which the defendant was a member, could at most only operate as a quit-claim by the United States in favor of the original grantees, and could not decide the question of derivative title under said original grantees. That the mere fact of the land described in the confirmation to Choteau, and the land described in the confirmation given in evidence by the plaintiff, and the declaration, being identical, does not entitle the defendant to a verdict in his favor. That no forfeiture or disqualification has accrued against Madame Marie Louise, the widow of Louis Chancellier, or against her assigns, under any act of congress ; whereby she or they are barred from asserting their legal and equitable rights to the lots in question before this court. Which instructions were given by the court.

Instructions asked by the plaintiff, and partly refused by the court.

1. That the sale and partition, and final decree, of which duly certified copies have been given in evidence by the plaintiff, establish the title of the widow of Louis Chancellier, Madame Marie Louise Deschamps, and her heirs, to the land described in said sale and partition, as sold and allotted to her ; part of which said land consists of the two arpents by forty, in the declaration described, bounded by Bijou, on the one side, and by J. B. Bequette, on the other.

2. That independently of the title of Rene Kiersereau and J. B. Gamache, there would be sufficient evidence before the jury, to establish a title by prescription in Louis Chancellier and his heirs, and Marie Louise, his widow, and her heirs, to the two forty arpents described in the declaration.

*3. That Hyacinth St. Cyr took no title by prescription in and to said lots. [*464

4. That if the jury shall be of opinion, that Hyacinth St. Cyr had notice of the sale of said lots to Marie Louise, by the proper Spanish authority, as given in evidence by the plaintiff, the possession of said Hyacinth St. Cyr of said arpents was not such as could be adverse to Marie Louise, or could create an estate by prescription in favor of said St. Cyr.

5. That if the jury shall be of opinion, from the evidence, that St. Cyr

was a purchaser at the public sale of the property of Louise Chancellier, or signed his name, or made his mark, as purchaser, on the margin of said sale; these facts are *primâ facie* evidence that said St. Cyr had notice of the title of said Marie Louise, as purchaser at said sale, of the lots therein described as sold to her.

6. That the deeds given in evidence by defendant to Rene Kiersereau, bearing date the 23d of October 1793, conveyed nothing to St. Cyr; being made by a person out of possession, and whose conveyance for the same land to another person, to Chancellier, was upon record, and who, therefore, was guilty of the crime of *estellionato*, punishable by fine and banishment, by the Spanish law then in force.

7. That the deed given in evidence by defendant, from Joseph Gamache to Hyacinth St. Cyr, dated 23d October 1793, is void, on the ground of *estellionato*, in Batis Gamache, supposing that he made the deed: 2d, on the ground of uncertainty in the deed itself, in this, that it purports to be a deed of Joseph Gamache, and is signed, Batis Gamache ⋈ his mark.

8. That Auguste Choteau took no estate by prescription in either of said forty arpent lots in question.

9. That there is no evidence of possession whatever, adverse or otherwise, by Auguste Choteau, of said two forty arpent lots, or any part thereof.

10. That if the jury shall be of opinion, from the evidence before them, that the said Auguste Choteau had notice of the public sale of said lots, to Madame Marie Louise Chancellier, his possession or claim to said lots under Hyacinth St. Cyr is fraudulent and void as against said Marie Louise, and her heirs and assigns.

11. That the certified copy of the proceedings and sale by the syndic, in the matter of Hyacinth St. Cyr, a bankrupt, is not evidence either of St. Cyr's title to either of the lots in question, or that the *same were sold by said syndic, to said Auguste Choteau, as part of said St. Cyr's property.

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12. That the defendant has shown no title by prescription, under the Spanish or civil law, or by the statutes of limitation (in bar of plaintiff), under the Anglo-American laws, to the lots in question.

13. That the title of the defendant, as assignee of Auguste Choteau, is vitiated by the fraud which vitiates the title of Choteau and of St. Cyr.

14. That the deed from Auguste Choteau and wife, to Lucas, of the lots in question, dated 11th January 1808, is void for fraud; if, in opinion of jury, it was a sale and conveyance to Lucas of a claim and interest pending before said Lucas himself for adjudication.

15. That if, in the opinion of the jury, the claim was pending before Lucas, as commissioner, when he bought it, the adjudication or confirmation of it, on the 23d July 1810, by the board of commissioners, of which Lucas was a member, is fraudulent and void, at law and in equity.

16. That neither the statute of limitations, nor the Spanish law of prescription, can avail the defendant, Lucas, independently of the possession of St. Cyr and Choteau.

17. That the orders of survey given in evidence by the defendant, and made by himself and his two colleagues, in favor of Auguste Choteau, bearing date June 10th, 1811, was fraudulent and void; if the jury shall

be of opinion, from the evidence, that the claims therein ordered to be surveyed, had been sold to said defendant, by said Choteau, previous to the date of said order; and while said claims were pending for adjudication before said defendent, as member of the board of commissioners in said order mentioned.

18. That if any penal effect resulted from any act of congress, to Madame Chancellier and her assigns, or to the legal representatives of Rene Kiersereau and J. B. Gamache, the act of congress of January 1831, entitled, "an act further supplemental to the act, entitled, 'an act making further provisions for settling the claims to lands in the territory of Missouri,' passed the 13th day of June 1812," remits the parties to their original and equitable rights and titles, as if no such penal act had ever been in force.

19. That upon the case made by the plaintiff, he is entitled to a verdict for all that part of the two forty arpent lots in question, situated *west of Seventh street, in St. Louis, and all the lots east of Seventh street, according to the admissions of defendant, as above. [*466

20. That in this case, there is no law or binding ordinance of the Spanish government, by which Madame Chancellier, and those claiming under her, could be deprived, according to the state of the evidence in this case, of whatever title she acquired to the land in question, under the purchase made of it by her, as the property of her husband.

21. That if the jury believe, from the evidence, that St. Cyr ceased to cultivate and be in actual possession of the premises in dispute, from 1797 or 1798, prescription ceased to run in his favor, and that of those who claim under him from that time.

Which instructions the court refused to give; but instructed the jury in relation to the matter referred to in the first instruction above refused: "That the sale and partition, and final decree, the record of which certified copies have been given in evidence by the plaintiff, did pass the title of Louis Chancellier, mentioned in said proceedings of sale, such as it was at the time of his death, or such as it was in his heirs, at the time of said sale to Madame Marie Louise, his widow, mentioned in said proceedings, and her heirs, to the lands described in said record of sale and partition, as sold and allotted to her. And further instructed the jury, in relation to the matters mentioned in the 5th instruction above refused: "that if the jury should be of opinion, that St. Cyr, under whom the defendant claims, was a purchaser at said public sale, of the property of said Louis Chancellier, or did sign his name, or make his mark, on the margin of the record of said sale; these facts, or either of them, are evidence proper for them to consider, in ascertaining whether said St. Cyr had notice of the said title of said Marie Louise, as purchaser at the said sale of the lots described in the record thereof as sold to her." And further instructed the jury, in relation to the matters referred to in the 11th instruction above refused: "That the certified copy of the proceedings and sale by the syndic, of the property and estate of St. Cyr, as a bankrupt, was not evidence of a title to said St. Cyr to the lots in question, or either of them." And further instructed the jury, in relation to the matters referred to in the 12th instruction above refused, and to the statutes of limitation referred to in that refused instruction: "That the defendant *had shown no title to the lots in question, nor any bar to the plaintiff's recovery, under any statute or statutes of limitation." And fur- [*467

ther instructed the jury, in relation to the matters referred to in the 16th instruction above refused: "That the statute of limitations could not avail the defendant, Lucas, either with, or independent of, the possession of St. Cyr." And further instructed the jury, in relation to the matters referred to in the 18th instruction above refused: "That although the act of congress of the 31st of January 1831, referred to in said refused instruction last mentioned, does not remit the penalties as in that refused instruction is supposed by the plaintiff; yet, that in fact, no penal effect results from any act of congress, which bars or stands in the way of plaintiff's recovery in the present action; or which in any manner affects his title, or evidence of title, under, or to be derived from, said acts, or any of them, under the admissions of the parties in the present case."

The first instruction refused, could not be given in the form it was asked, because it would have concluded the cause as to fact and law. The explanation given by the court was proper. The second and third asked the court to pronounce on the facts. The fourth asked the court to declare, that if St. Cyr had notice of Madame Chancellier's purchase, his title could not be confirmed by prescription. St. Cyr, and those claiming under him, could have prescribed, notwithstanding such knowledge, had the possession been continued a sufficient length of time. On this point, the charge of the district judge, in response to the instructions asked by the defendant, is substantially accurate. The explanation of the fifth instruction asked, is highly favorable to the plaintiff. The sixth asked the court to instruct the jury, that Kiersereau was not in possession, when he made the deed; and therefore, it was void. If St. Cyr was in *lawful* possession for himself, no forfeiture could follow by the conveyance to him; and this depended on the fact whether St. Cyr was lawfully in possession. How the civil law was, in 1793, in cases of conveyances, where the lands were claimed and holden in actual possession, adversely to the grantor and grantee at the time the deed was made, is immaterial, and is not decided. The seventh, eighth and ninth instructions asked, propose to refer to the court for decision, questions of
*468] fact, pertaining to the jury. *The tenth assumes, that Choteau's possession was void, if he had notice of the sale to Madame Chancellier. This by no means follows: he might have possessed in good faith, notwithstanding; of which the jury were to judge. But if the possession was in bad faith, still, its continuance for thirty years, by Choteau and those from whom he derived it, and the subsequent continuance thereof by Lucas, would have authorized the prescription. The eleventh and twelfth instructions asked were given; and the thirteenth asked the court to charge on the fact, and to declare to the jury there was fraud: a principal matter they were called on to try. The fourteenth, fifteenth and seventeenth instructions are the same that were in the cause previously before this court; when it was decided, that Lucas could purchase, under the circumstances indicated: the point is not deemed open to investigation; such is the opinion of my brethren who decided that cause, and with which I concur. The sixteenth asks a charge on the fact, how Lucas held possession, and the length of its continuance; and was properly refused. The eighteenth was correctly explained by the district court. The nineteenth proposes, in effect, that the cause be decided by the court: had the instruction been given, it would have withdrawn from the jury the determination of the facts. To

the twentieth, it may be answered, that by the laws of Spain, Madame Chancellier's title might have been prescribed against. The twenty-first is correctly answered by the district court; the judge said to the jury: "That if they should find from the evidence, that St. Cyr took possession, or was in possession, of the lands in controversy, or any of them, under said Marie Louise, or as her tenant, his possession so taken or held would be the possession of the said Marie Louise; and would not be a possession in St. Cyr, available by him or those claiming under him, under the law of prescription mentioned. But that if the jury should be of opinion, that said St. Cyr came to the possession of the land in controversy, not as the tenant of the said Marie Louise, nor under her, but under a claim and title adverse to her; such adverse claim and possession would constitute a possession, upon which a prescription, by the Spanish or civil law referred to, and then in force, would begin to run in favor of him, and those claiming under him, if such possession was actual, open and notorious; and that such possession, so commenced, *would constitute and preserve to St. Cyr, his heirs or assigns, a possession available under the law of prescription referred to, notwithstanding said St. Cyr, or those deriving title from him, should leave the actual possession, or cease to occupy and cultivate, if that abandonment of the actual possession, occupancy or cultivation, was with the intention to return, and without any mental abandonment of the possession." [*469

Instructions asked by defendant, and given by the court: "1st. That if the jury find from the evidence, that Hyacinth St. Cyr, and those lawfully claiming under him, have possessed the two arpents by forty, surveyed for Gamache and Kiersereau, without interruption, and with claim of title, for thirty years, consecutively, prior to October 1818, the plaintiff is not entitled to recover in this action. 2d. If the jury find from the evidence, that Hyacinth St. Cyr, and those lawfully claiming under him, possessed the two lots in the declaration mentioned, for ten years, consecutively, prior to, and until, the 23d day of July 1810, and the lands confirmed to Auguste Choteau on that day, are the same lands in the declaration mentioned, the plaintiff cannot recover in this action. 3d. If the jury find from the evidence, that the defendant possessed the lots of land in the declaration mentioned for ten years, consecutively, prior to the first of October 1818, the plaintiff cannot recover in this action." Which instructions the court gave to the jury; with the further instruction: "That the possession mentioned must be an open and notorious possession; and that if they should find such possession, it gave title under, and according to, the Spanish or civil law, which was in force in Upper Louisiana, at the date of the treaty by which Louisiana was acquired by the United States; and remained in force and unabrogated by any law of the district of Louisiana, or of Missouri, down to a period as late as October 1818. That the possession of ten or thirty years would give a title, the one period or the other, according to the circumstances under which the possession was obtained. That the ten years' possession which would give a prescriptive title, must be a possession under a purchase made in good faith, and where the purchaser believed that the person of whom he purchaser had a good title, and where the owner of the title prescribed against resided in the same country during the said ten years. That if the jury believe from the evidence, that the possession of St. Cyr, *under whom the defendant claims, was obtained under a purchase made by [*470

him in good faith, and under the belief that the persons of whom he purchased had a good title; and that the possession of Choteau, under whom the defendant claims, was obtained in like manner, and under a purchase made with the like belief; and that they had the possession mentioned in the second instruction asked for on the part of the defendant; and that the said Marie Louise was in the country during the said ten years, the plaintiff cannot recover in this action." And further instructed the jury, in relation to the possession mentioned in the third instruction asked for on the part of the defendant: "That to make the possession therein mentioned a bar to the plaintiff's recovery in the present action, the possession of the defendant must have been obtained under a purchase, where he believed that the persons of whom he purchased had a good title, and that the said Marie Louise was in the country during the said ten years; which, unless the jury believe, they cannot find for the defendant upon such possession." The foregoing instructions given for the defendant, with the explanations, are substantially correct.

This is the whole case; in the affirmance of the judgment in which, I concur, for the reasons here stated. But there are various principles introduced into the preceding opinion, the accuracy of which I very much doubt. Furthermore, it is apprehended, they are foreign to the case presented by the record; and it is feared, their introduction into it, may lend them a sanction they do not deserve, and embarrass the inferior courts, and this court, in future, in the numerous controversies, now depending, and likely to arise on the titles of Florida, Louisiana, Missouri, Arkansas and Wisconsin, involving the application and construction of the laws of France and Spain: and hence this separate opinion has been filed.

Wayne, Justice, stated, that he dissented from the opinion of the court, delivered by Mr. Justice Baldwin. He was authorized to say, that Mr. Justice McKinley concurred with him in opinion. The title to the lots was in Chancellier at the time of his death. St. Cyr obtained a title by fraud, and by fraud he continued in possession. Choteau's claim is not such as divested the title of Chancellier, according to the Spanish law.

*471] *McLean, Justice, dissented.

Taney, Ch. J., did not sit in this cause, having been of counsel for one of the parties.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Missouri, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

Ex parte Emily T. and Matilda Poultney, Complainants, *v.* The City of La Fayette, Shields *et al.*

Chancery practice.—Mandamus.

A *subpœna* in chancery was issued from the circuit court of the United States for the Louisiana district, on the 15th of July 1837, returnable to the next term of the court, to be holden in November; some of the defendants appeared, and an affidavit was filed, stating that upwards of 200 persons were named as defendants in the bill, and that owing to the epidemic in New Orleans and at La Fayette, and the absence of many of the defendants, it had been impossible for the defendants to prepare for a defence to the bill; for this and for other reasons, an extension of the time for their appearance was essentially necessary for their proper defence, &c., and that the application was not made for delay. The circuit court, on this affidavit, laid a rule on the complainants to show cause why the defendants should not be allowed to the next term to make their appearance and defence; and that in the meantime no further proceeding should be had in the case; the solicitors for the complainants moved that the cause should be placed on the rule docket of the court, that the complainants might proceed in the cause, according to the chancery practice; this motion was overruled by the circuit court. The complainants moved the supreme court for a rule on the circuit court to show cause why a *mandamus*, in the nature of a *procedendo*, should not issue, commanding the court to send the case to the rule docket of the court. We can perceive nothing in the proceedings of the circuit court to warrant the rule to show cause, which has been asked for in behalf of the complainants; on the contrary, judging from the evidence contained in the record, the conduct of the court in relation to the cause in question, appears to have been strictly conformable to the practice and principles of a court of equity.

The statements contained in a petition addressed to the supreme court, asking for "a rule to show cause why a *mandamus*, in the nature of a writ of *procedendo*, should not be issued," not being verified by affidavit; they cannot, under the decisions and practice of the court, be considered.

Every court of equity possesses the power to mould its rules, in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty, to exercise a sound discretion upon this subject; and to enlarge the time, whenever it shall appear that the purposes of justice require it. The rules in chancery proceedings in the circuit courts, prescribed by this court, do not, and were not intended to, deprive the courts of the United States of this well-known and necessary power.

On a motion, by *Crittenden*, for a rule on the judges of the circuit court of the United States for the eastern district of Louisiana, for a rule to show cause why a *mandamus*, in the nature of a writ of *procedendo*, should not issue, &c.—

*Taney, Ch. J., delivered the opinion of the court.—This case comes before us upon a motion on the part of the complainants, for a [*473 rule upon the judges of the circuit court for the eastern district of Louisiana, to show cause why a *mandamus*, in the nature of a writ of *procedendo*, should not issue from this court; commanding the circuit court to "remand this suit to the rule-docket of the court, so that the complainants may proceed therein according to chancery practice."

The copy of the record upon which this motion is founded shows, that a bill in equity was filed in the circuit court, by the above-named complainants, against the above-named defendants, on the 15th of July 1837; and that *subpœnas* thereupon issued, returnable to the next term of the circuit court, to be holden on the third Monday in November, in the same year. On the return of the *subpœnas*, some of the defendants appeared; and an

affidavit was filed on behalf of a great number of them, stating that upwards of 200 persons were named as defendants in the bill; that owing to the epidemic, which had prevailed in the city of New Orleans and city of La Fayette, and the absence of many persons, and the recent service of the process upon many of the defendants, it had been impossible for the greater part of them, until within a short time before, to take the steps which they deemed necessary to their defence; that they had but recently been able to engage counsel, and had been informed by them, that it was wholly out of their power, with a due regard to the rights of their clients, to ascertain the facts necesssary to enable them to decide upon the nature and mode of defence, at that term; that there was some uncertainty as to the proper mode of proceeding in equity in the circuit court, on account of recent decisions on the subject; and that on account of the great importance of the matters to be tried, an extension of time for the appearance of the defendants was essentially necessary to their proper defence, and to obtain the ends of justice; and that the affidavit was not made for delay, but solely for the ends of justice. Upon this affidavit, the court laid a rule upon the complainants to show cause on the next day, the 21st of November, why the defendants should not be allowed until the first day of the next term, to make their appearance and defence; and in the meantime, that no further step or proceeding be had in the case.

On the 15th of December, at the same term, the complainants, by their solicitors, moved the court "to enter an order, directing the *clerk
*474] of the court to place the cause upon the rule-docket of the court, so that the complainants might proceed in the cause, according to the chancery practice; this motion was overruled by the court. It does not appear, whether the time asked for by the defendants was given or not; nor is there any further order or proceeding in the case, in the certified copy of the record from the circuit court, filed here by the complainants. An attested copy of a rule of proceeding in civil cases, adopted by the circuit court on the 20th of November 1837, accompanies the record; but it does not appear, that anything has been done, or omitted to be done, under this rule, in the suit now in question. The statements contained in the petition addressed to this court, not being verified by affidavit, they cannot, under the decisions and practice of the court, be considered in the matter before us.

We perceive nothing in the proceedings of the circuit court, to warrant the rule to show cause which has been asked for in behalf of the complainants. On the contrary, judging from the evidence contained in the record, the conduct of the court in relation to the cause in question, appears to have been strictly conformable to the practice and principles of a court of equity. The particular object of the motion made by the complainants in the circuit court, is not distinctly stated. It did not ask for any specific order or process, but appears to have been made in opposition to the previous motion of the defendants for time to answer. And from the terms used in the motion of the complainants, we suppose, they desired the court to deny the motion of the defendants, and to allow the complainants to proceed at the rules to be held by the clerk, without any extension of the time to answer.

The rules of chancery practice, mentioned in the motion of the com

plainants, must, of course, mean the rules prescribed by this court for the government of the courts of equity of the United States, under the act of congress of May 8th, 1792, ch. 137, § 2; which are undoubtedly obligatory on the circuit courts. But if the order had been made, pursuant to the motion, and the case transferred to the rules, under the direction of the clerk, the time asked for by the defendants would, in effect, have been refused; and under the 6th rule of practice prescribed for the circuit courts, the complainants would have been entitled to proceed on their bill as confessed, if the defendants did not appear and file their answer within three months after the day of appearance limited to these rules. We think the *court did right in refusing this motion. Every court of equity [*475 possesses the power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty, to exercise a sound discretion upon this subject, and to enlarge the time, whenever it shall appear that the purposes of justice require it. The rules prescribed by this court do not, and were not intended to, deprive the courts of the United States of this well-known and necessary power; and the facts stated in the affidavit before referred to, certainly presented a case in which it was proper to exercise it.

In expressing our opinion on the conduct of the court, we do not mean to intimate that a *mandamus* would have been the proper remedy, if we had found that the court had fallen into error. It is not our purpose, on this occasion, to express any opinion as to the cases in which it would be fit for this court to exercise such a power. In the evidence exhibited by the complainants, we perceive no just ground of complaint against the decision of the circuit court, and have, therefore, felt it to be our duty to say so; but at the same time, to refrain from expressing any opinion upon questions which do not belong to the case. The motion for the rule to show cause why a *mandamus* should not issue, is therefore overruled.

On motion for a rule on the judges of the circuit court of the United States for the eastern district of Louisiana, to show cause, &c. On consideration of the motion made in this cause, on a prior day of the present term of this court, to wit, on Monday, the fifth day of February, A. D. 1838, by Mr. Crittenden, of counsel for the petitioners, for a rule on the judges of the circuit court of the United States for the eastern district of Louisiana, to show cause why a writ of *mandamus* should not be awarded, to them directed, commanding them, the said judges, to make an order remanding the above suit to the rule-docket of the said circuit court, so that the petitioners therein may proceed according to chancery practice, and of the arguments of counsel there upon had; it is now here ordered and adjudged, by this court, that the said motion be and the same is hereby overruled.

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United States *v.* Zephaniah Kingsley.

Florida land claims.

A grant for land in Florida, by Governor Coppinger, on condition that the grantee build a mill within a period fixed in the grant, declared to be void; the grantee not having performed the condition, nor shown sufficient cause for its non-performance.

Under the Florida treaty, grants of land made before the 24th January 1818, by his Catholic Majesty, or by his lawful authorities, stand ratified and confirmed, to the same extent that the same grants would be valid, if Florida had remained under the dominion of Spain; and the owners of conditional grants, who have been prevented from fulfilling all the conditions of their grants, have time, by the treaty, extended to them, to complete such conditions. That time, as was declared by this court in Arredondo's case (6 Pet. 743), began to run, in regard to individual rights, from the ratification of the treaty; and the treaty declares, if the conditions are not complied with, within the terms limited in the grant, that the grants shall be null and void.

In the construction of the Florida treaty, it is admitted, that the United States succeeds to all those equitable obligations which we are to suppose would have influenced his Catholic Majesty to secure their property to his subjects, and which would have been applied by him, in the construction of a conditional grant, to make it absolute; and further, that the United States must maintain the rights of property under it, by applying the laws and customs by which those rights were secured, before Florida was ceded; or by which an inchoate right of property would, by those laws and customs, have been adjudicated by the Spanish authority to have become a perfect right.

The cases decided by the court relative to grants of land in Florida, reviewed and affirmed.

Appeal from the Superior Court of East Florida. In the district court of East Florida, in April 1829, Zephaniah Kingsley presented a petition, claiming title to a tract of land, situated on a creek emptying into the river St. John; which he asserted was granted to him by Governor Coppinger, on the 20th of November 1816, while East Florida was held by the crown of Spain. The petition stated, that in virtue of the grant, the petitioner had, soon after its date, entered and taken possession of the land, and was preparing to build a water saw-mill thereon, according to the condition of the grant; but was deterred therefrom by the disturbed state of that part of the province of East Florida, and the occupancy of the land by some of the tribes of Florida Indians, who were wandering in all directions over the country. *The grant referred to in the petition, was in the following terms:

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"Considering the advantage and utility which is to accrue to the province, if that is effected which Don Zephaniah Kingsley proposes to do, it is hereby granted to him, that, without prejudice of a third party, he may build a water saw-mill in that creek of the river St. John, called McGirt's; under the precise condition, however, that until he builds said mill, this grant will be considered null and void; and when the event takes place, then, in order that he may not suffer by the expensive preparations he is making, he will have the faculty of using the pines comprehended within the square of five miles, which he solicits, for the supply of said saw-mill; and no other person will have a right to take anything from it. Let the corresponding certificate be issued to him from the secretary's office.

Coppinger."

The district-attorney of the United States for East Florida, filed, at May term 1829, an answer to the petition of Zephaniah Kingsley, requiring

from the court that due proof should be made by the petitioner, of the matters set forth in the petition; and also, that the grantee had prepared to build a water saw-mill on the land, as stated in the grant. The answer also asserted, that the grant was made on the express condition, that, until the grantee built the mill, the grant was to be considered as null and void; and that he had wholly and entirely failed to build the mill, and still failed to build the same.

On the 6th July 1833, an amended petition was filed, setting forth, that, upon the state and condition of the province of East Florida, east of the St. John's, being made known by the grantees of mill grants, and of the impossibility of complying with the conditions of the grants, Governor Coppinger, by a verbal order or decree, made known, that in consequence of the continued unsettled and disturbed state of the province, and of the impossibility of the grantees of mill grants complying with the conditions of the same, with safety to themselves or their property, the grantees should not, by a failure to erect their mills, thereby forfeit their title; but that the same should remain valid, and be exonerated from the compliance of the condition therein named, till the state of the country should be such as that the grantees could, with safety, erect their works. The amended petition alleged, that the country was in a disturbed and dangerous state, from the date of the petitioner's grant, and for a long time previous, till the transfer of the province from *Spain to the United States; and that the petitioner could not, with any safety to himself or his property, have [*478 erected said mill, west of the St. John's, between the time of the date of his grant, and the transfer of the province as aforesaid.

To this amended petition, the district-attorney answered, and called for proofs of the allegation therein; and he also submitted to the court, that if the part of province in which the land said to have been granted, had continued in a disturbed situation from Indian hostilities, it had been in that situation when the grant was made; and that this should not be an excuse for the non-compliance with the conditions of the grant. The answer alleged, that from 1821, part of the province had been entirely tranquil, but no attempt to erect the mill had been made.

At July term 1835, a second amendment to the petition was filed, stating that soon after the issuing of the grant, the petitioner entered and took possession of a tract of the land surveyed to him under the grant, and actually began to build a mill upon it; but was deterred, by the dangerous situation of the country, from completing the same.

The answer of the district-attorney denied the allegations in this petition, and called for proofs of the same. No evidence was given to sustain the statement in the second amended petition. The assertion, that the uncertainty as to titles to the lands in the province since the transfer by Spain, was denied to be an excuse for the *laches* or negligence of the grantee.

After the production of written evidence, and the examination of witnesses, the district court gave a decree in favor of the petitioner; confirming to him the quantity of land mentioned in the grant. From this decree, the United States prosecuted an appeal to this court.

The case was argued by *Butler*, Attorney-General, for the United States. No counsel appeared for the appellee.

Butler contended, that the grant to the appellee was on condition, and the condition had not been complied with. The language of the grant is explicit; and no title to the land could be derived under it, until the terms were complied with: "Until he builds said mill, this grant will be considered null and void; and when that event takes place, then, in order that he may not suffer by the expensive preparations he is making, he will have the
*479] faculty of using the *pines comprehended within the square of five miles, which he solicits, for the supply of said saw-mill."

It is admitted, that according to the decisions of this court, giving the timber on the land, gives the land; but in this case the objection to the confirmation of the appellee's grant, rests on other grounds. No attempt to comply with the condition of the grant was made. It has been decided by this court, that although such grants were on conditions precedent, yet if a party has commenced making the improvement, and is prevented by circumstances beyond his control from completing it, the grant, under an equitable view of it, will not be defeated. The strongest case in favor of a grantee is that of *Sibbald*, 10 Pet. 313. In that case, efforts were made to build the mill, and they were defeated; but in the case before the court, no such efforts were made. The condition is, within six months the mill shall be built; and the consideration for this grant is the advantage and utility which will accrue to the province from the improvement. The allegation that the disturbed situation of the province would not permit the improvement, is of no value; when taken in connection with the circumstance, that when this grant was asked for, the province was in that situation. No proof is in the case, of any attempt; and the second amended petition, in which this is asserted, is altogether unsupported by evidence. The allegation was not made, until the decisions of this court, making an attempt to comply with a condition in a grant, sufficient to make such grant valid.

But there is another view of this case, upon which the claim of the petitioner to a confirmation of a grant should be refused. Governor Coppinger, by a written order, declared that within six months the condition in all grants should be complied with. White's Compilation of the Spanish Land Laws, 250. The six months allowed by the order, expired long before the Florida treaty of cession.

Wayne, Justice, delivered the opinion of the court.—This is an appeal by the United States from a decree of the superior court of the eastern district of Florida, confirming a land-claim. It appears, that Zephaniah Kingsley, on the 20th of November 1816, being then an inhabitant of the province of Florida, petitioned Governor Coppinger, stating, "that wishing to erect a water saw-mill on that creek of the river St. John, called McGirt's, on a vacant place, and it being necessary for that purpose to have a quantity of
*480] *timber sufficient to supply said mill and establishment, he supplicates your excellency to be pleased to favor him with your superior permission to build the same on the place aforesaid, with its area of five miles square of land as the equivalent thereof, for its continued supply of timber; bounded south-east and south by lands granted to Ferguson and Doctor Lake; south west and west by vacant lands; north by Don Juan McIntosh's land, and east by lands of said Kingsley, and the river St. John." Upon this petition, the governor made the following decree:

"Considering the advantage and utility which is to accrue to the prov-

ince, if that is effected which Don Zephaniah Kingsley proposes to do, it is hereby granted to him, that without prejudice of a third party, he may build a water mill on that creek of the river St. John, called McGirt's; under the precise condition, however, that until he builds said mill, this grant will be considered null and void; and when the event takes place, then, in order that he may not suffer by the expensive preparations he is making, he will have the faculty of using the pines comprehended within the square of five miles, which he solicits, for the supply of said saw-mill; and no other person will have a right to take anything from it. Let the corresponding certificate be issued to him from the secretary's office.

"St. Augustine, 2d Dec. 1816. COPPINGER."

Upon this decree, the petitioner states, that soon after the date of it, he entered upon and took possession of the land granted in the situation mentioned in said grant, and was preparing to build a water saw-mill, agreeable to the condition of the grant; but was deterred therefrom by the disturbed state of that part of the province of East Florida, and the occupancy of the land by some of the tribes of Florida Indians, who were then wandering in all directions over the country. The appellee then insists, that his right to the land is embraced by the treaty between Spain and the United States; gives a narrative of his submssion of his claim to the board of commissioners, under the act of congress, entitled "an act amending and supplementary to an act for ascertaining claims and titles to land, in the territory of Florida, and to provide for the survey and disposal of the public lands in Florida," passed 3d March 1823; that the commissioners reported unfavorably upon it, which he insists was contrary to the law and evidence produced in the cause: and further, that the report of the commissioners upon his claim was not final, as the tract of land claimed by him, contains a larger quantity than the *commissioners were authorized to decide upon, by any of the acts of congress. [*481

The petition of the appellee, of which an abstract has been just given, was filed on the 21st April 1829. In the following month, the United States, by the United States' attorney, filed an answer to this petition, denying, for sundry causes and reasons, the entire existence and equity of the appellee's claim; and in August of the ensuing year, the United States' attorney amended his answer, referring to certain orders of Governor Coppinger, dated 27th October 1818, and on the 19th January 1819; the first of which limits the time to six months from the 27th October 1818, within which all grants and concessions of land which had been made on condition for mechanical works, to wit, factories, saw-mills, &c., were to revert to the class of public lands, and to be declared vacant; unless the grantees or concessioners should comply with the conditions of such grants or concessions; and the second of which declares all such conditional grants or concessions null and of no effect, in those cases where the persons in whose favor they were made, had remained inactive, having done nothing to advance the establishment of those works. See White's Compilation, 250, 253, 256, 257, for these orders.

The United States' attorney alleges the appellee to be one of those persons whose supposed concession was null and void, under the first order; and that it was entirely annulled and set aside by the last, as he had not then, nor had not since, established or advanced, in any manner, the build-

ing of his mill, but had wholly failed and neglected to do so. To this answer, the appellee put in a general replication; and the cause came, by regular continuance, to the term of the court, in November 1832, when permission was given to the appellee to amend his petition. In July 1833, he filed the amendment, stating that the disturbed and dangerous condition of the province west of the St. John's river, which continued from 1812 to the exchange of flags, had induced Governor Coppinger to declare, by a verbal order and decree, that in consequence of the unsettled and disturbed state of the province, and the impossibility of the grantees of mill-grants to comply with the conditions of the same, with safety to themselves and their property, the grantees should not, by a failure to erect their mills, forfeit their titles. Of
*482] the existence, however, of any such modification of the condition *of such grants, by any verbal order and decree, the appellee gave no proof on the trial of this cause.

To the amendment of the appellee's petition, the United States' counsel replies, denying the existence of any such verbal order and decree by Governor Coppinger; and stating, that if there was any such danger from the disturbed condition of the province, as the appellee had alleged, that it existed as well at the time when he applied for the grant, and when he accepted the same, as at any time afterwards. In this state of the pleadings, the cause was brought to trial, as well upon the evidence on the part of the United States, as upon the part of the appellee; but was not then decided. At the July term of 1835, the appellee filed, by permission of the court, another amendment to his petition, in which, after reciting the surveys made under the decrees of the governor, upon his petition, he further says, that soon after the grant was made to him, he took possession of the land, and actually began to build a water saw-mill on McGirt's creek, pursuant to the condition of the grant; but that he was deterred and prevented from completing the same, by the disturbed and dangerous state of the country, which continued until the cession of Florida by Spain to the United States. And after that cession, he states, he was deterred from proceeding to the further performance of the conditions of said grant, by the great uncertainty in which his right and title of said land was involved by said cession. To this amendment of the petition, the United States' attorney replied, repeating the facts and objections to the claim of the appellee made in his previous answers; and further insisting, that the surveys, upon which the appellee relied, were made after the 24th of January 1818, and are not agreeable to the calls of the said supposed grant; and that they are null and void, by the provision of the latter clause of the 8th article of the treaty between Spain and the United States, of the 22d February 1819.

Upon these pleadings and the evidence, the court has decreed the appellee's claim to be valid; that it is in accordance with the laws and customs of Spain; and under and by virtue of the late treaty with Spain; and under and by virtue of the laws of nations, and of the United States.

We think differently from the court, upon all the grounds stated in the decree. They open a wide subject of remark; but we abstain from discussing any of them, except the application of the treaty to this claim, or of the laws and customs of Spain. These points we shall touch very briefly. We
*483] first observe, that no *case of a land-claim in Florida, confirmed by this court, under the treaty, either in terms, or by necessary inference

from what the court has said, covers this case. We view this claim under the decree of Governor Coppinger, as a permission to enter upon the land designated in the petition and decree, in which land the appellee did not and could not acquire property, or even inchoate title, such as embraced in the 8th article of the treaty, or by this court's construction of it, until he had, in good faith, prepared to execute the condition which the appellee held out as the inducement to obtain a grant; or in other words, we think the decree of the governor contains a condition precedent, to be performed by the appellee, before the grant could take effect. In this case, the appellee never attempted to perform the condition; there is no proof of his having done so in good faith, by the expenditure of money or application of labor. On the contrary, there are, in the original petition of the appellee to the court below, and in all the subsequent amendments of it, from 1829 to 1833, his declarations that he had not done so, until the amendment made in 1835; when he states, for the first time, that he actually began to build a water saw-mill, according to the conditions of the grant, a short time after it was made, but that he was prevented from completing it by the disturbed and dangerous condition of the country. The only proof given by him of his having actually began to build, is very equivocal, and should have been rejected by the court, on the ground of its being hearsay; except so much of it as relates to the remains of some work or mill-dam, which, of itself, could not be evidence, until, by other proof, the appellee had established the fact of such work having been done by himself, as the witness testifying says expressly, that it was only from hearsay that he had said that work was done by the appellee. The witness says, he does not know of his own knowledge, that the appellee ever made any attempt or preparations for building a saw-mill on said mill-seat tract, but that he had seen timber on the said tract; was told it was got by Kingsley, for the purpose of building a saw-mill; that he afterwards saw a dam had been erected on each side of the stream, in the bottom of the stream, saw timbers laid, as witness supposed, for the sills of a saw-mill; that he only knws from hearsay, that said preparations were made by Kingsley; that a part of the preparations are still remaining, and to be seen on said tract; that he first saw the timber above mentioned, in the year 1817 or 1818, and shortly after, saw *the dam and sills afore- [*484
said; that the said timber was mostly destroyed by fire. And by the record we are left to conclude that these works were made by Kingsley, without any, even probable, proof that he had at any time taken possession of the land. We cannot do so; and if we could, it would be deemed by us no compliance with the condition contained in the governor's decree or concession in his favor, as the work was discontinued for an insufficient cause—that was, the disturbed and dangerous condition of the country.

All the witnesses concur in stating there was no more danger, after the appellee petitioned for the land, then there had been before and at the time of his application. The appellee then cannot be permitted to urge as an excuse, in fact or in law, for not complying with his undertaking, a danger which applies as forcibly to repudiate the sincerity of his intention to build a mill, when he petitioned for land for that purpose, as it does to his inability, from such danger, to execute it afterwards. Under the treaty, it is true, that grants of land made before the 24th January 1818, by his Catholic Majesty, or by his lawful authorities, stand ratified and confirmed,

to the same extent that the same grants would be valid, if Florida had remained under the dominion of Spain; and the owners of conditional grants, who have been prevented by the circumstances of the Spanish nation, from fulfilling all the conditions of their grants, have time, by the treaty, extended to them, to complete such conditions. That time, it was determined by this court, in *Arredondo's Case*, 3 Pet. 748–9, began to run, in regard to individual rights, from the ratification of the treaty; and the treaty declares, if the conditions are not complied with, within the terms limited in the grants, that the grants shall be null and void. It is admitted, that in the construction of this article of the treaty, the United States succeeds to all those equitable obligations which we are to suppose would have influenced his Catholic Majesty to secure to his subjects their property; and which would have been applied by him, in the construction of a conditional grant, to make it absolute. And further, in the construction of this article of the treaty, it must be conceded, that the United States must maintain the rights of property under it, by applying the laws and customs by which those rights were secured, before Florida was ceded, or by which an inchoate right of property would, by laws and customs, have been adjudicated by Spanish authority, to have become a perfect right; by applying, in the first instance, in such cases, as was said in *Arredondo's Case*, the principles of justice, *according to the rules of equity; and in the second, all those laws and customs decisive of a right of property, whilst the party claiming the right was a subject of Spain. Test, then, the case before us by the most liberal equity, and it will appear, that the claim of the appellee cannot be sustained by any effort by him to perform the condition of the governor's grant; either before the ratification of the treaty, or since. Indeed, in the last amendment of his petition, in 1835, he states he was prevented from proceeding to the further performance of the condition of said grant, by the great uncertainty in which his right and title to the land was involved by the cession.

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These Florida grants, or concessions of land upon condition, have been repeatedly confirmed by this court; and it will apply the principles of its adjudications to all cases of a like kind. It will, as it has done, liberally construe a performance of conditions precedent or subsequent, in such grants. It has not, nor will it apply, in the construction of such conditions, in such cases, the rules of the common law. But this court cannot say, a condition, wholly unperformed, without strong proof of sufficient cause to prevent it, does not defeat all right of property in land, under such a decree as the appellee in this case makes the foundation of his claim.

Arredondo's grant, confirmed by this court (6 Peters), was a clear case of a grant in fee, for past services and commendable loyalty to his sovereign, with a condition subsequent, of a nature the performance of which must have been a matter of indifference as well to the king of Spain as to the United States, after a cession of Florida was made. The condition was, that the grantees should establish on the land 200 Spanish families, and that they were to begin to carry into effect the establishment, within three years from the date of the grant; and there was no time limited for its completion. This court said, in that case (6 Pet. 745): "From the evidence returned with the record, we are abundantly satisfied, that the establishment was commenced within the time required (which appears to have been

extended for one year beyond that limited in the grant), and in a manner which, considering the state of that country, as appears by the evidence, we must consider as a performance of that part of the condition.

The case of *Segui* (10 Pet. 306), was a grant in consideration of services to the Spanish government, and for erecting machinery for the purpose of sawing timber. That grant was confirmed by this court, upon the ground, that the governor considered the services *of Segui a sufficient consideration, and made the grant absolute. *Seton's Case* (9 Pet. 311) [*486 was a decree or permission of the governor, in all particulars like that now before us; and Seton's right to the survey which had been made, and to the equivalent quantity to make up the extent of the original concession, was confirmed by this court; upon the positive proof, that Seton had built his mill, in a year after the date of the decree upon which he claimed. *Sibbald's Case* (9 Pet. 313), another like Seton's, and that before the court, was confirmed by this court, upon the ground, that Sibbald had performed the condition, according to the rules of equity which govern these cases. Sibbald, in good faith, and within a reasonable time after the decree in his favor, began to build his mill; expended $5000 towards it; had his horses and negroes stolen, while the mill was building; his mill-dam carried away by a freshet, in the absence of his millwright, who was in pursuit of the stolen property; rebuilt his mill in 1827, which was destroyed by fire, the same year; and the year after, built again another mill of twenty horse power, which could saw 20,000 feet of lumber a day.

It remains only for us to say a word concerning the laws and customs of Spain, supposed by the learned judge in the court below, applicable to the confirmation of this claim under the treaty. The fact that no instance is known of land so decreed having reverted to the class of public lands, for the non-performance of the condition, does not prove a custom; unless a current of cases can be shown, in which claimants have held the land without performance. Besides, the existence of any such custom is disproved by the decree for the land itself; by the subsequent decrees of the Spanish governor, declaring lands granted upon condition would be null and void, within a certain time, if the conditions were not performed; and by the treaty itself, which stipulates for the performance of conditions, within terms after the treaty was made, contained in the grants, and which is recognised by this court, by its decision, that the time given only begins to run against individual rights, from the date of the ratification. As to the laws of Spain, supposed to aid the case, we remark, it being conceded, that the governor had authority to make grants and concessions, and to give permission to persons to enter upon lands upon conditions; nothing less than a law dispensing with the performance of them, or a release of the performance of them by the governor, sanctioned by the general royal authority under which he acted; or a release by royal authority, after grants were made, general *in its application, or applicable to some [*487 particular case or class of cases, can be admitted, *proprio vigore*, as a release of the obligations upon grantees to perform the conditions of these grants. It is not pretended, that any such law or release exists.

Baldwin, Justice, dissented.

This cause came on to be heard, on the transcript of the record from the

superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the petitioner having failed to fulfil the condition of the grant, the said grant or concession is null and void; and that the said petitioner has no right or title to the land. Whereupon, it is now here decreed and ordered by this court, that the decree of the said superior court in this cause be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said superior court, with directions to enter a decree in conformity to the opinion of this court.

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*488] **Ex parte* CHARLES F. SIBBALD, Appellee, *v.* UNITED STATES, Appellants.

Practice.—Mandate.

On an appeal from the superior court of East Florida, by the United States, the decree of the court of East Florida was in part affirmed; the title of Sibbald, the appellee, to whom the grant of land had been made by the Spanish governor, before the cession of Florida, having been deemed valid by the supreme court; the decree of the supreme court directed the surveyor of public lands in East Florida to do all things enjoined on him by law, in relation to the lands in the surveys made for the grantee; the case was remanded to the superior court of East Florida, for the execution of this decree. The mandate of the supreme court for the execution of its decree, was directed to the superior court of East Florida; and the surveyor of public lands would not make the surveys of the lands in the grant, according to the decision of the court, the mandate not having been issued to him; a petition was presented to the court by Sibbald, stating these facts, and asking the court to order that a mandate be made out, directing the surveyor of public lands to do all required of him in relation to the surveys of the lands of the grantee, in conformity with the decree of the court; and also to the superior court of East Florida, directing the court to cause further to be done therein what right and according to law and justice and in conformity to the decree of the court, ought to be done. Had it appeared, that a mandate more special than the one which was sent would have been necessary, it would have been ordered; the court is bound to grant a mandate which will suit the case; the mandate which is annexed to the petition, was issued by the clerk, directed only if the court below, and no direction is given to the surveyor; it is, therefore, no execution of the final decree of the supreme court; and as it remains unexecuted, it is not too late to have it done; and requires no new order or decree in any way modifying that which has been rendered. The clerk was ordered so make out a certificate of the final decree of the court before rendered; and also a mandate according to such final decree, the opinion of the court in the case, and on the petition.

Appellate power is exercised over the proceedings of inferior courts, not on those on the appellate courts; the superior court have no power to review their decisions, whether in a case at law or equity; a final decree in chancery is a conclusive as a judgment at law; both are conclusive on the rights of the parties thereby adjudicated. No principle is better settled, or of more universal application, that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes; or to reinstate a cause, dismissed by mistake; from which it follows, that no change or modification can be made, which may substantially vary or affect it, in any material thing. Bills of review in cases of equity, and writs of error *coram vobis*, at law, are exceptions.

When the supreme court have executed their power in a case before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but will send a special mandate to the court below to award it; whatever was before the court and is disposed of, is considered finally settled.

*489] *The inferior court is bound by the decree, as the law of the case; and must carry it into execution according to the mandate; they can examine it for no other purpose than

execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it further than to settle so much as has been remanded.

After a mandate, no rehearing will be granted; and on a subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate.

If the special mandate directed by the 24th section of the judiciary act is not obeyed, then the general power given to "all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," by the 14th section of the judiciary act, fairly arises; and a *mandamus* or other appropriate writ will go.

Mr. Clarke, for Sibbald, moved to reform the mandate issued by the court, in this case, at January term 1836, so as to conform the same to the opinion given by the court at that time; or to issue a mandate to the surveyer-general of the district of East Florida, to do those acts and things which he is commanded to do by the judgment of this court, and which are enjoined on him by law. He cited 10 Pet. 313; 3 Story's Laws 1962; 9 Pet. 171; 10 Ibid. 100.

The petition on which the motion was made, stated, that at January term 1836, of the supreme court of the United States, the case of the United States, appellants, *v.* Charles F. Sibbald, appellee, was argued and determined in favor of said Charles F. Sibbald; and thereupon, the following decree was given, to wit:—

"On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court, confirming the title of the petitioner to the 10,000 acres on Trout creek, be and the same is hereby affirmed; and that the residue of the decree of the said superior court be and the same is hereby reversed and annulled. And this court, proceeding to render such decree as the said superior court ought to to have rendered, doth order, adjudge and decree, that the claim of the petitioner to the land embraced in the surveys of 4000 acres, and of 2000 acres, as returned with and contained in the record, is valid; and that the same be and is hereby confirmed. And it is further ordered, adjudged and decreed by this court, that the surveyor of public lands in the eastern district of Florida be and he is hereby directed to do, and cause to be done, all the acts and things enjoined on him by law, in relation to the lands within said survey. And that the said cause be *and the same is hereby remanded to the said superior court, to cause further to be done therein, what of right, [*490 and according to law and justice, and in conformity to the opinion and decree of this court, ought to be done." See 10 Pet. 324.

The petitioner further represented, that he made application, by his solicitor, to said superior court of East Florida, to execute the madate aforesaid; and which mandate he now exhibited in this court, together with the opinion of the judge of said superior court, declining to execute said mandate, according to the requirements of the petitioners, for want of power or authority under said mandate. The petitioner further represented, that by the opinion and judgment of this honorable court, he considered two points as clearly settled, to wit: first, that he was entitled to the full complement of 16,000 acres, according to his original grant: secondly, that he had an inherent privilege to direct or point out where other locations should be made, in case the survey or surveys made for him, was interfered with by older and good claims. The petitioner further represented, that after said

mandate was issued, and its execution demanded, it was clearly ascertained, that there were divers interferences with older surveys, so as to prevent him from obtaining his full amount of lands; unless the deficiency were made up to him by other locations, to be pointed out. It would be seen, by the opinion of the judge of said superior court, that he declined so to direct said surveys, according to his construction of said mandate. The petitioner further set forth, that in the decree of said court, the surveyor-general of East Florida was ordered and directed to do certain acts, and make the surveys therein ordered; but that no such mandate had been directed to said surveyor. He, therefore, prayed that said mandate might be issued, in such terms as in the opinion of the court might be right and proper. The petitioner, therefore, humbly prayed the court to amend the error in said mandate, so as to conform to the judgment of the court; and that full and complete execution thereof might be had.

The petition was sworn to by Charles F. Sibbald, before a justice of the peace of the county of Washington, in the district of Columbia.

On the 7th of March 1838, the counsel for the petitioner filed the following supplemental petition.

*491] *The supplemental petition of said Charles F. Sibbald, respectfully represents: That by reference to the judgment of the court, as set forth in 10 Pet. 324, it was "ordered, adjudged and decreed, that the surveyor of public lands in the eastern district of Florida, be and he is hereby directed to do, and cause to be done, all the acts and things enjoined on him by law, in relation to the lands within said survey." And it was further ordered, adjudged and decreed, "that the said cause be and the same is hereby remanded to the said superior court, to cause further to be done therein, what of right, and according to law and justice, and in conformity to the opinion and decree of this court, ought to be done." Your petitioner respectfully represents, that by the said judgment and decree, certain duties were imposed upon the surveyor of the public lands, as well as upon the said superior court; but that the mandate of this court, as made out by the clerk, is made to the judge of the superior court only, and none is directed to said surveyor, which your petitioner considers not to be an execution of, or in conformity with, the judgment of this court. The duties of a surveyor are prescribed by the 6th and 11th sections of the act of congress of 1824. (4 U. S. Stat. 54–5.) And by an act of 23d May 1828, are made applicable to cases in Florida. (Ibid. 285, § 6.) The duties of the judge of the superior court are defined by the 1st section of said act of 1824. (Ibid. 45.) Your petitioner, therefore, respectfully prays, that the mandate of the court, as rendered, be made out by the clerk in conformity to the judgment of the court, and that it be so done as to direct the said surveyor, by a mandate to him, to do, or cause to be done, all the acts and things enjoined on him by law, in relation to the lands within said surveys. And also to direct the mandate to the superior court, to cause further to be done therein what of right, and according to law and justice, and in conformity to the opinion and decree of this court, ought to be done.

Baldwin, Justice, delivered the opinion of the court.—The matter of the original and supplemental petition of the party is founded on a final decree of this court in the case of the *United States* v. *Charles F. Sibbald*,

which is reported in 10 Pet. 313, 325; in which latter page will be *found the final decree and mandate therein made; the substance [*492
whereof is fully set out in the petitions now before us.

Before we proceed to consider the matter presented by these petitions, we think proper to state our settled opinion of the course which is prescribed by the law for this court to take, after its final action upon a case brought within its appellate jurisdiction; as well as that which the court, whose final decree or judgment has been thus verified, ought to take.

Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The supreme court have no power to review their decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. 1 Wheat. 355; 6 Ibid. 113, 116. Both are conclusive on the rights of the parties thereby adjudicated. No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (3 Wheat. 591; 3 Pet. 431); or to reinstate a cause dismissed by mistake (12 Wheat. 10): from which it follows, that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error *coram vobis*, at law, are exceptions which cannot affect the present motion.

When the supreme court have executed their power, in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. 24th sect. Judiciary Act (1 U. S. Stat. 85). Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. 1 S. C. 194, 197; 1 Hen. & Munf. 557; 3 Munf. 228. After a mandate, no rehearing will be granted. It is never done in the house of lords (3 Dow P. C. 157): and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. 5 Cranch 316; 7 Wheat. 58–9; 10 Ibid. 443.

If the special mandate directed by the 24th section, is not obeyed [*493
*or executed, then the general power given to "all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," by the 14th section of the judiciary act, fairly arises, and a *mandamus*, or other appropriate writ will go. (1 U. S. Stat. 81.)

In the original cause, the now petitioner claimed 16,000 acres of land, which had been surveyed in three tracts of ten, four, and two thousand acres. The court below confirmed his title to the tract of 10,000 acres, surveyed at the place called for in the grant; but rejected his claim to the two others, surveyed elsewhere, by their final decree, which concluded thus: "And it is further ordered, adjudged and decreed, that the said claimant have leave to survey the whole number of acres called for in his grant, at the place designated in the same; provided vacant lands of sufficient extent

may be obtained at that place." The effect of this decree was to confirm the title to the whole quantity of 16,000 acres called for in the grant, if so much could be found vacant at the place called for; but to prohibit the survey of the deficiency at any other than the place designated; whereby the claim was reduced to 10,000 acres. On an appeal to this court, the petitioner's claim was confirmed to its full extent of 16,000 acres, according to the three separate surveys in the record; the decree below was affirmed as to the 10,000 and reversed as to the two other surveys of 4000 and 2000 acres respectively; and a mandate ordered accordingly.

In order to ascertain the true intention of the decree of confirmation, and consequently, of the mandate and its effect; that part of the decree below which was affirmed, must be taken in connection with the petitioner's title, and the construction of it by this court. Both courts confirmed the title to the whole quantity claimed; the difference between them was as to the two small surveys, which the court below rejected on their construction of the grant; being of opinion, that by its terms, the whole quantity must be surveyed in one place. This court, construing the grant differently, held, that by its terms, it authorized surveys at places other than the one described; and that after surveying all that was vacant there, the quantity found deficient might be surveyed where the grantee designated. This was done, as appeared by the evidence; surveys were made by the proper
*494] officers, *and without objections by the Spanish governor. These were the surveys confirmed by this court, at the place referred to in the plots in the record. See 10 Pet. 323–4. There can, therefore, be no difficulty in understanding the mandate in this respect. It gives to the surveys of four and two thousand acres, the same validity as if they had been made for the land specified in the grant; as the "equivalent" of what could not be found vacant at the place called for in the grant. In the decree of the court below, the proviso, if vacant lands of sufficient extent can be obtained at that place; must be referred to the decree of this court, affirming that part of the decree, in conformity with the opinion, as to the "equivalent, for such portion of the whole quantity as was not open to appropriation when the 10,000 acres were surveyed. To make up such "equivalent," consistently with the declared opinion of the court, the party must have the right of filling up his claim in some mode, or he will obtain a less quantity than has been confirmed to him by our final decree; which the law declares shall be final and conclusive between the parties, who were the United States and the petitioner. (4 U. S. Stat. 53.) The latter must, therefore, have his 16,000 acres somewhere.

By the 11th section of the act of 1824, provision is made for the case, in enacting, "that if in any case it should so happen, that the lands, tenements or hereditaments, decreed to any claimant under the provisions of this act, shall have been sold by the United States, or otherwise disposed of; or if the same shall not have been heretofore located; in each and every such case the party may enter the like quantity," &c. (4 U. S. Stat. 55.) This section applies to each of the three surveys, provided that either comes within its provisions, by its appearing that any part thereof cannot be obtained pursuant to our decree. By the 6th section of the same act, the duties to be performed after a final decision in favor of the claimant, are prescribed; the clerk of this court is to give a copy of the decree, under

the seal of the court, to the party, who shall deliver it to the surveyor of the state or territory, who shall cause the land to be surveyed, and a plot thereof to be made out and returned to the land-office; which shall entitle the party to a patent. (Ibid. 54.) This section applies to confirmations, where there is no interfering claim, so that nothing remains to be done by the court below; but when the case comes under the 11th section, then the surveyor and the court *below must both act; the one, to ascertain what portion of either of the confirmed survey comes within its provisions; and the other, to decide on the return of the surveyor, how much land, if any, is to be entered at the proper land-office. In such cases, the court below acts under our mandate, to execute our decree on those matters which remained for their future action; which is to be done in the same manner, *pro tanto*, as when the whole case was originally before it, in the first instance, according to the provisions of the first section of the act, with this exception; that they cannot act on any question of the title of the party to the full quantity confirmed, nor decide against the validity of the surveys which have been confirmed by this court. So far as our final decree goes, it must be taken to be conclusive. On receiving the mandate, the court below must "determine all questions arising (in its execution) in relation to the extent, locality and boundaries of the said claim, or other matters connected therewith, fit and proper to be heard and determined; and may, at discretion, order disputed facts to be found by a jury, and otherwise proceed as directed in that section." (Ibid.) By this reference to the law, the meaning of the mandate of this court, directed to the surveyor, commanding him to do and perform the acts enjoined on him by law; and to the court below, "to cause further to be done therein, what of right, according to law and justice, in conformity to the opinion and decree of this court, ought to be done," is evident. [*495

In *Mitchel* v. *United States*, where the court apprehended that some difficulty might occur, a special mandate was made out on great deliberation. 9 Pet. 761–2. In *Soulard* v. *United States*, one was made to meet the case (10 Ibid. 105–6); and had it appeared from the record, in the case between the United States and the petitioner, that a mandate more special than the one made out would have been necessary, it would have been done. The one ordered is, in substance, the same as those; and with the references now made, will meet the prayer of the petition, which we feel bound to grant, for the reasons set forth. The mandate which is annexed to the petition, was issued by the clerk, directed only to the court below, and no direction is given to the surveyor: it is, therefore, no execution of our final decree; and as it thus remains unexecuted, it is not too late to have it done, and requires no new order or decree, *in any way modifying that which has been rendered in the reported case. [*496

It is, therefore, ordered, that the clerk of this court make out a certificate of the final decree heretofore rendered in the case of the *United States* v. *Sibbald;* and also a mandate according to such final decree, the opinion of the court in that case, and on these petitions.

On consideration of the motion made in this cause by Mr. Clarke, of counsel for the appellant, on a prior day of the present term of this court, to wit, on Saturday, the 10th day of February, A. D. 1838, and of the arguments of

counsel thereupon had, it is now here considered, ordered and adjudged by this court, that the clerk of this court make out a certificate of the final decree heretofore rendered in the case of the *United States* v. *Sibbald;* and also a mandate according to such final decree, the opinion of the court in that case, and on this petition.

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*497] *James M. Reynolds, John B. Byrne and William Farriday, Merchants, Trading under the Firm of Reynolds, Byrne & Co., *v.* James S. Douglass, Thomas G. Singleton and Thomas Going.

Guarantee.—Letter of credit.

The rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound, without notice, where the maker of the note was insolvent at its maturity; unless he can show he has sustained some prejudice by want of notice of a demand on the maker of the note, and notice of non-payment.

If the guarantor could prove he had suffered damage by the neglect to make the demand on the maker of the note, and to give notice, he could only be discharged to the extent of the damage sustained.[1]

In order to enable the party claiming under a guarantee, to recover from the guarantor by a letter of credit, he must prove that notice of its acceptance had been given in a reasonable time after the letter of credit had been accepted; this notice need not be proved to have been given in writing, or in any particular form; but may be inferred by the jury, from facts and circumstances which shall warrant such inference.

A recognition by the parties to a letter of credit, of their obligation to pay as guarantors, under a supposed liability, which did not arise from the facts of the case, and of which facts they were ignorant, would not be a waiver of the notice they were entitled to have of the acceptance of their guarantee.

A party to a note, entitled to notice, may waive the notice, by a promise to see it paid, or an acknowledgment that it must be paid; or a promise that "he will set the matter to rights;" or by a qualified promise, having knowledge of the *laches* of the holder.

A promise to pay a debt, by the guarantors, qualified with a condition which was rejected, is not a waiver by the guarantor of his right to notice of the acceptance of the guarantee.

When the party in whose favor a letter of credit is given, afterwards becomes insolvent, and his insolvency is known to the guarantors, it is not necessary, in an action on the letter of credit, to prove that a demand of payment was made on the insolvent.

Error to the District Court for the district of Mississippi. This case was before the court, at January term 1833, on a writ of error prosecuted by the plaintiffs in the court below; and was then remanded to the district court of Mississippi, with directions to issue a *venire facias de novo.* (7 Pet. 113.) The facts of the case are fully stated in the case reported in 1833.

*498] The plaintiffs again brought up the case; and it was argued by *Southard,* for the plaintiffs in error; and by *Jones,* for the defendant.

McLean, Justice, delivered the opinion of the court.—This case is brought before this court by a writ of error to the district court of Mississippi. The action is founded on the following guarantee:

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[1] See note to Douglass *v.* Reynolds, 7 Pet. 113.

Port Gibson, 27th December 1827.

Messrs. Reynolds, Byrne & Co.

Gentlemen :—Our friend, Mr. Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptances or indorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you, at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so. Your obedient servants,

James S. Douglass,
Thomas G. Singleton,
Thomas Going.

On the trial, the plaintiffs proved that they treated this paper as a continuing guarantee ; and from time to time, on the faith of it, accepted drafts, indorsed bills, and made advances of money, at the request of Haring. And an account-current was given in evidence, showing a balance due to the plaintiffs, from Chester Haring, on the 1st of July 1828, of $13,702.73 ; on 1st of January 1829, of $32,920.57 ; and on the 1st of July, in the same year, of $25,109.57. And eight bills of exchange, drawn by Haring on the plaintiffs, amounting to $8000, and which were accepted and paid by them, in the year 1828, were also given in evidence. On the 1st of May 1829, it was proved, that Haring executed five promissory notes, in the whole amounting to $25,000, which were indorsed by Daniel Greenleaf, and also by the plaintiffs ; and which were payable in the months of November, December, January, February and March, succeeding ; the proceeds of *which notes, [*499
when discounted, were to be credited to Haring in the general account.

On the 11th of April 1829, Haring sold and transferred to Daniel Greenleaf his mercantile establishment, which constituted the whole of his property ; and in August or September following, he died. At the time this transfer was made, Greenleaf gave a bond, in the penalty of $32,000, with Thomas G. Singleton, one of the guarantors, and others, as sureties, conditioned that he would faithfully pay the debts of Haring, as therein stated; and especially, after paying the home debts, " that he should pay the sum of $8000 to the sureties and signers of a letter of credit to Reynolds, Byrne & Co., in favor of the concern of Chester Haring, for that amount ; or otherwise relieve and exonerate the sureties and signers to said letters of credit." And on the 24th of December following, Daniel Greenleaf assigned to James S. Douglass, another of the guarantors, by deed of trust, on the conditions stated therein, " all his debts, claims and demands, either at law or in equity, due or to become due." This assignment included the property, &c., he received from Haring. One of the witnesses examined stated, that he heard James S. Douglass and Thomas Going say, they considered the above assignments would indemnify them for their liability under the guarantee.

There was a good deal of evidence in the case, which, in considering the questions of law on the instructions, it is not material to notice.

This case was brought before this court, on certain exceptions, at the January term 1833 ; at which time, the following points were adjudged. 1. That the paper in question was a continuing guarantee, and was not dis-

charged on the payment of advances, acceptances and indorsements amounting to $8000; but that it covered future and successive advances, acceptances and indorsements. 2. That to entitle the plaintiffs to recover on the guarantee, they must show, that within a reasonable time, they gave notice of its acceptance. 3. That notice of the future and successive advances, acceptances and indorsements, after the acceptance of the guarantee, was not necessary. 4. That in the case of non-payment, the plaintiffs were *500] required to *show a demand of Haring; and, within a reasonable time, a notice to the guarantors.

After the evidence was closed, the plaintiffs moved the court to instruct the jury, "if they believe that Chester Haring was insolvent, previous to the maturity of any of the five promissory notes drawn by Chester Haring, dated the 1st May 1829; and that these notes were indorsed upon the faith of the letter of credit, by the plaintiffs; then such previous insolvency rendered it unnecessary for the plaintiffs to give the defendants, as guarantors, notice of a demand upon and refusal by Chester Haring to pay the said notes; and the plaintiffs are entitled to recover. But the court refused to charge as requested; and charged the jury, that the insolvency of Chester Haring could be proved only by a record of the insolvency, or by admission of the defendants, and not by common rumor or hearsay evidence."

This instruction was incautiously drawn, and its language is open to criticism. It would seem, at the first view, to place the right of the plaintiffs to recover, on the fact of Haring's insolvency. This would dispense with notice of the acceptance of the guarantee, and with all evidence of advances of money by the plaintiffs, and of acceptances and indorsements under it, except the five notes referred to. But such could not have been the meaning of the instruction, as understood by the counsel concerned in the case, and by the court. Much evidence had been given of advances of money, of acceptances and of indorsements on the faith of the guarantee; and also evidence of facts, from which the jury might, in the exercise of their discretion, infer a notice to the defendants that the guarantee had been accepted. In the view of these facts, it cannot be supposed, that the plaintiffs would ask the court to instruct the jury to find in their favor, aside from all the other evidence in the case, if the insolvency of Haring should be satisfactorily established.

The instruction was undoubtedly intended to recover the objection, that no demand had been made of Haring, on his failure to pay, or notice given to the defendants. And that if the jury should find the notes referred to had been indorsed on the faith of the letter of credit, the previous insolvency of Haring rendered notice of a demand on him unnecessary; and consequently, the want of this notice constituted no objection to the plaintiff's recovery. That the court considered the instruction in this light, is clear, from the qualification which they annexed to it. By charging the jury, that the insolvency of Haring could be proved only by the admission *501] of the defendants, *or by record evidence, the court seem to consider, if the fact of insolvency were legally made out, demand and notice were unnecessary. Although the objection to the structure of the prayer is not without force, yet we are inclined to think, that if the instruction had been given in the terms requested by the plaintiffs, under the circumstances, it could not have misled the jury. They could not have understood the

instruction as laying down the basis of a recovery, independent of all other evidence in the case.

In this part of the record, the question is fairly raised, whether the insolvency of Haring, either prior to, or at the time of payment, will excuse the plaintiffs from making a demand on him, and giving notice to the guarantors. At the death of Haring, the notes given by him on the 1st May 1829, and indorsed by Greenleaf, were not due. And these promissory notes, to have had an influence in the case, under the instruction, must have been indorsed by the plaintiffs on the faith of the guarantee.

An objection is made, that these notes greatly exceed in amount the guarantee ; and, consequently, that they could not have been indorsed on the credit of the guarantors. The same objection is urged against the various balances, which exceed the amount ef the guarantee as stated in the account-current. And it is contended, that to bind the guarantors, the advances, acceptances and indorsements, although made at successive periods, on the faith of the guarantee, must not exceed it in amount. If this objection were well founded, it could not affect the right of the plaintiffs. They have brought their action on the guarantee, and exhibit eight bills of exchange, amounting to $8000, which they aver were accepted and paid by them, on the faith of the guarantee. The question as to the liability of the guarantors, under acceptances and indorsements, for a sum exceeding $8000, does not, therefore, arise in this case ; and it is unnecessary to consider it. The advances which were made, from time to time, and also the acceptances and indorsements on the credit of the guarantee, go to show how it was considered and treated by the plaintiffs. And it was a question for the jury, to determine, whether the advances, acceptances and indorsements, as alleged by the plaintiffs, were made under the guarantee.

*If the insolvency of Haring was a material fact in the case, how was it to be proved? Could it be proved only by record evidence, [*502 or by the admissions of the defendants, as decided by the district court? No reason is perceived for this rule, and there is no principle of law that sustains it. The insolvency of Haring could be proved in the same manner as any other fact in the cause. Was he without property, and unable to pay the demands against him? There can be no difficulty in showing his circumstances, by competent proof.

But does the insolvency of Haring, if it be established, excuse the failure to make a demand on him at the maturity of his notes ; and to give notice to the guarantors. In the case of *Gibbs* v. *Cannon*, 9 Serg. & Rawle 198, it was held, that on a guarantee of a promissory note, made and indorsed by others, if the maker and indorser are insolvent, when the note becomes due, this would, *primâ facie*, be evidence that the guarantor was not prejudiced ; and therefore, the giving him notice of non-payment, is, in such case, dispensed with. And in the case of *Halbrow* v. *Wilkins*, 1 Barn. & Cres. 10, the court say, if a guarantor of a bill be informed, before it is due, of the insolvency of the acceptors, and that the plaintiff looked to him for payment ; it is not necessary to prove presentment and notice of non-payment. In the case of *Warrington* v. *Furbor*, 8 East 242, Lord Ellenborough says, the same strictness of proof is not necessary to charge the guarantors, as would have been necessary to support an action upon the bill itself, where, by the law-merchant, a demand upon, and refusal by, the

acceptors must have been proved, in order to charge any other party upon the bill; and this, notwithstanding the bankruptcy of the acceptors. But this is not necessary to charge guarantors, who insure, as it were, the solvency of the principals; and therefore, if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead; and it is nugatory to go through the ceremony of making a demand upon them. Mr. Justice LAWRENCE, in the same case, says, that although proof of a demand on the acceptors, who had become bankrupts, was not necessary to charge the guarantors; yet that the latter were not prevented from showing, that they ought not to have been called upon at all; for that the principal debtors could have paid the bill, if demanded of them. And Mr. Justice LE BLANC also says, in the same case, there is no need of the same proof to charge a guarantor, as to *charge a party whose name is upon the
*503] bill of exchange; for it is sufficient, as against the former, to show that the holder of the bill could not have obtained the money, by making a demand upon the bill. In the third volume of his Commentaries, p. 123, Chancellor KENT says, it has been held, that the guarantor of a note could be discharged by the *laches* of the holder, as by neglect to make demand of payment of the maker, and give notice of non-payment to the guarantor; provided the maker was solvent when the note fell due, and became insolvent afterwards. The rule is not so strict as in the case of mere negotiable paper; and the neglect to give notice must have produced some loss or prejudice to the guarantor. The same principle is laid down in the following cases: *Phillips* v. *Astling*, 2 Taunt. 206; *Swinyard* v. *Bowes*, 5 M. & S. 62; *Van Wart* v. *Woolley*, 3 Barn. & Cres. 439.

The rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound, without notice, where the maker of the note was insolvent at its maturity. That his liability continues, unless he can show he has sustained some prejudice, by want of notice of a demand on the maker of the note and non-payment. In the case before us, there is no pretence, that the defendants have sustained any injury from a neglect of the plaintiffs to make a demand on Chester Haring for payment of the balances against him, in the account-current; or for the amount paid in discharge of the eight bills of exchange referred to in the declaration.

But if the defendants could prove they had suffered damage by the neglect of the plaintiffs to make the demand and give notice, according to the case of *Van Wart* v. *Woolley*, 3 Barn. & Cres. 439, they could only be discharged to the extent of the damage sustained. As before remarked, Haring died before any of the promissory notes, dated 1st May 1829, became due; and consequently, no demand on him for the payment of these notes could be made. From the facts in the case, it appears, that the defendants resided in Fort Gibson, the place where Haring lived: and it cannot be doubted, that they had knowledge of his death. From these considerations, it is clear, that the district court erred in refusing to give the first instruction asked by the plaintiffs.

The plaintiffs also requested the court to charge, that if the jury believed, that Chester Haring transferred all his property to Daniel
*504] *Greenleaf, on the 11th April 1829, and that Daniel Greenleaf, at that time, engaged to pay all the debts of the said firm, and to secure the

defendants from their liability on the letter of guarantee ; and that Daniel Greenleaf, on 24th December 1829, by deed of trust to one of the defendants, James S. Douglass, transferred claims to the amount of twenty-eight or nine thousand dollars, to secure the defendants for their liability on said letter of credit ; then it is not necessary for the plaintiffs to prove, that the defendants were duly notified of their liability on said letter of credit ; which charge the court refused to give. The facts, hypothetically stated as the basis of this instruction, are such, as if found by the jury, must have had influence on their minds ; for they conduce to show, that the defendants had received knowledge of their responsibility under the letter of credit, and of the circumstances of Haring. But as the instruction does not necessarily import the insolvency of Haring, which, or his death, can alone excuse the plaintiffs from making a demand on him, and giving notice to the defendants of his failure to pay ; the court did not err, in declining to give the instruction. The facts supposed in the instruction might be admitted ; and yet the insolvency of Haring, at some subsequent period, would not follow as a consequence.

Several instructions were given by the court, at the request of the defendants' counsel, to which the plaintiffs excepted ; and we will now consider them.

And first, the court charged the jury, that to entitle the plaintiffs to recover on said letter of credit, they must prove, that notice had been given in a reasonable time after said letter of credit had been accepted by them to the defendants, that the same had been accepted. This instruction, being in conformity to the rule formerly laid down by this court in this case, was properly given. This notice need not be proved to have been given in writing, or in any particular form ; but may be inferred by the jury, from facts and circumstances which shall warrant such inference.

The court also instructed the jury, that if they believed from the evidence, that two of the defendants, Going and Singleton, admitted that the debt sued for was a just debt, and that the said two defendants stated, that they would try to arrange the payment thereof, out of the funds or effects that had been assigned by Daniel Greenleaf to James S. Douglass ; and that the admission and declaration were made in 1830, and that at said period, no notice had been given by *the plaintiffs to the defendants, that said guarantee had been accepted by them ; and that said defendants [*505 were uninformed, at the time of such admission and declaration, of such failure to give such notice ; that then such admission and declaration do not operate in law a waiver of, and dispense with the necessity of, such notice. This instruction must have been hastily drawn ; but we understand it as laying down the principle, that a recognition of their obligation to pay, by the defendants, under a supposed liability, which did not exist, from the facts of the case, and of which facts they were ignorant, would not be a waiver of the notice. In this view, the instruction was correctly given.

And the court further instructed the jury, that in the absence of evidence of notice, given, in a reasonable time, by the plaintiffs, that said letter of credit had been accepted by them, the mere acknowledgment by the defendants, that the debt sued for was a just debt, did not dispense with the necessity of such notice ; but that to dispense with such notice, there must be evidence of an express and unconditional promise by the defendants tc

pay, made under a full knowledge that such notice had not been given. This instruction is not founded upon the supposition that the defendants were ignorant of the necessity of a notice to bind them ; and this ignorance, therefore, cannot be presumed. The proposition, then, is, that although the defendants knew that a notice was necessary to bind them, and which had not been given ; an acknowledgment of the debt, and a promise to pay, which is not express and unconditional, would not dispense with notice. In giving this instruction, we think the court erred. A party to a note, entitled to notice, may waive it by a promise to see it paid ; or an acknowledgment that it must be paid ; or a promise that " he will set the matter to rights ;" or by a qualified promise, having knowledge of the *laches* of the holder. *Hopes* v. *Alder*, 6 East 16 ; Selw. N. P. 323 ; *Haddock* v. *Beery*, 7 East 236 ; *Rogers* v. *Stevens*, 2 T. R. 713 ; *Anson* v. *Bailey*, Bull. N. P. 276. In the case of *Thornton* v. *Wynn*, 12 Wheat. 183, this court say, an acknowledgment of his liability, by the indorser of a bill or note, and knowledge of his discharge by the *laches* of the holder, will amount to a waiver of notice.

In their fourth instruction, the court say, that a qualified or conditional promise, made by the defendants to pay the debt sued for, which was rejected by the plaintiffs or their agent, is not a waiver of *the *506] necessary notice from the plaintiffs to defendants, that said letter of credit had been accepted by them. This instruction is somewhat vague in its language ; but if it is to be considered as laying down the rule, that a promise to pay the debt, qualified with a condition which was rejected by the plaintiffs, or their agent ; the court were right in saying, that it was not a waiver of notice.

In their fifth and last instruction, the court charge the jury, that to enable the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for ; and in case of non-payment, notice should have been given in a reasonable time, to the defendants ; and on failure of such proof, the defendants are in law discharged. This instruction rests upon the necessity of a personal demand of Haring, by the plaintiffs. It has been already shown, that this demand was unnecessary, in case of Haring's insolvency ; the instruction was, therefore, on the facts in the case, erroneous. The judgment of the district court must be reversed, and the cause remanded for a *venire de novo.*

BALDWIN, Justice, dissented.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Mississippi, and was argued by counsel : On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby reversed and annulled ; and that this cause be and the same is hereby remanded to the said district court, with directions to award a *venire facias de novo.*

*Pierre Choteau, Senior, Plaintiff in error, *v.* Marguerite, a Woman of Color, Defendant.

Error to state court.

The supreme court has no jurisdiction of a case brought by a writ of error from the supreme court of the state of Mississippi, under the 25th section of the judiciary act, where the question was, whether the appellee was a slave. The provisions of the treaty by which Louisiana was ceded to the United States, and in which was a guarantee of the property of persons residing at the time of the cession within the territory of Louisiana, may be enforced in the courts of the state of Missouri. The allegation that the treaty has been misconstrued by the supreme court of the state, in refusing to sanction the claim asserted, will not give the supreme court of the United States jurisdiction in the case.

In the case of Crowell *v.* Randell, 10 Pet. 368, the court revised all the cases on jurisdiction, under the 25th section of the judiciary act, and laid down the law as they wished it to be universally understood.

Error to the Supreme Court of the third judicial district of the state of Missouri. In 1825, Marguerite, a woman of color, by her next friend, Pierre Barrebeau, filed a declaration in the circuit court for the county of Jefferson, in the state of Missouri, alleging that Pierre Choteau, sen., had beat and bruised her, and unlawfully detained her in prison, against her will, &c. The object of this proceeding was, to establish that the complainant, the descendant of an Indian woman, Marie Scipion, was free, and was unlawfully held as a slave by the defendant. Pierre Choteau appeared to the suit, and pleaded that Marguerite was a slave, in his lawful possession, and so detained by him.

The case was submitted to a jury, in Jefferson county, and a verdict was found for the plaintiff; which was afterwards set aside by the court, and a new trial ordered. The suit was afterwards tried before the same court, and a verdict was given for the defendant. The plaintiff filed a bill of exceptions; and on a writ of error to the supreme court of Missouri, the judgment of the circuit court was reversed, and the cause was remanded to that court. It was afterwards remanded to the circuit court of St. Charles county, and was there tried again before a jury; and a verdict and judgment were rendered in favor of the plaintiff. The defendant, on the trial, moved the court to instruct the jury:

*1. If the jury find, from the evidence, that the mother of Marie Scipion was an Indian woman, of the Natchez nation, taken captive [*508 in war by the French; and that she and her descendants were publicly and notoriously held as slaves, in the province of Louisiana, while the same was held by the French, prior to the year 1769; and that she and her descendants were so publicly and notoriously held as slaves, without interruption, in the said province, until the 30th April 1803, and thence to the time of the commencement of this suit; the jury ought to find for the defendant.

2. If the jury find, from the evidence, that the mother of Marie Scipion was an Indian woman, taken captive in war, and reduced to slavery by the French; and that from the time of her capture, she and her descendants were publicly and notoriously held as slaves, in the province of Louisiana, while the same was held by the French, before the year 1769, and afterwards, while the same province was in the possession of, and held by, Spain

and France, until the 30th day of April 1803, and thence until the commencement of this suit; they ought to find for the defendant.

3. That the Indians taken captive in war by the French, might lawfully be reduced and held in slavery in the province of Louisiana; whilst it was held by the crown of France.

4. If the jury find, from the evidence, that the said Marie Scipion was born, while her mother was so held in slavery, within the province of Louisiana, while the same was held by the French, prior to the year 1769; that the said mother was held in slavery, in the province of Louisiana, from the time of her birth until the 30th April 1803, and thence until the time of her death; then the jury ought to find for the defendant.

5. If the jury find, from the evidence, that Marie Scipion was born, while her mother was held in slavery, and that she, the said Marie Scipion, was publicly and notoriously held as a slave, from the time of her birth until her death, within the territory ceded to the United States, by the treaty between the United States of America and the French Republic, bearing date the 30th April 1803, and that, at the date of said treaty, the said Marie Scipion was so held as a slave, within the said ceded territory, by an inhabitant thereof; then the jury ought to find for the defendant.

The court refused to give these instructions; and the defendant sued out a writ of error to the supreme court of Missouri, where the judgment of the circuit court of Jefferson county was affirmed. *The de-
*509] fendant then sued out the writ of error to the supreme court of the United States, under the 25th section of the judiciary act of 1789, to the supreme court of Missouri.

Butler, for the defendant in error, moved to dismiss the writ of error, on the ground that the case was not within the provisions of the 25th section of the judiciary act. He contended, that no question had arisen in the case, in which this court could be called on to interfere with its revising powers. The plaintiff in error claimed, that the treaty of Louisiana, of 30th April 1803, protected him in his property in the defendant, as she was his slave. The question before the circuit court, and which was submitted to the jury, was, whether the plaintiff was a slave; and the jury found that she was free. Under the 25th section of the judiciary act, the jurisdiction of this court, in writs of error to the supreme courts of the state, prevails in those cases in which a treaty of the United States has been drawn in question, and has been misconstrued; or a statute of the United States has been misconstrued and disregarded. It has been supposed, that this suit is within the class of cases cognisable in the supreme court of the United States, as the defendant claimed Marguerite as a slave, under the Louisiana treaty.

The first instruction has no reference to the treaty. The counsel sought to have the instructions of the court, that if the plaintiff was always held as a slave, up to the time of the treaty, she continued such. The court held, that she could not be a slave. Whether this opinion was right or not, the construction of the treaty was not drawn in question. The protection of the treaty was not denied; and the decision of the court was such as did not make the case within its provisions. The plaintiff had no property in Marguerite, which the treaty operated upon. But this court decided, that

the general provisions of the ordinance of 1787, could not give the supreme court jurisdiction, where rights of property were asserted to have been violated by the decision of a state court. *Menard* v. *Aspasia*, 5 Pet. 505.

In the case of *Crowell* v. *Randell*, 10 Pet. 368, there is a review of all the cases on the question of the jurisdiction of this court, in cases from the highest court of the states of the United States. In that, and in all the other cases, the law is laid down to be, that the appellate jurisdiction of this court can only be sustained when *it appears, that the question over which [*510 the jurisdiction exists must appear to have been brought before the court, and decided, according to the provisions of the 25th section; or that by clear and necessary intendment, the question must have arisen and must have been decided. The very point involved in this case has been decided. In the case of the *Mayor of New Orleans* v. *De Armas*, it was held, that the protection of the treaty existed, and its provisions were applicable, and would be enforced by the courts of the United States, until the territory became a state; afterwards, that protection was given by the constitution and laws of the state. If such a case as this could be entertained, then all questions of property, arising in the states erected in the country acquired by the United States, by the Louisiana treaty, could be brought here, a the guarantee of the treaty applies to all property.

Key, with whom was *Benton*, opposed the motion. He contended, that the decision of this court, in *Crowell* v. *Randell*, 10 Pet. 368, did not in any way enlarge the principles which had prevailed before. All the court are required to do, before they take jurisdiction, is to see that the case is such as presented a question cognisable by the court. The court, if its consideration was essential to the decision of the cause, will hold that it did arise, and was decided. He argued, that the treaty of Louisiana must have been considered by the supreme court of Louisiana in this case.

Story, Justice, said, that it had been thought that the decisions of the court had been misunderstood; and the court, in the case of *Crowell* v. *Randell*, 10 Peters, had revised all the cases; and had laid down the law as they wished it should be universally understood. The motion to dismiss the case was sustained.

Writ of error dismissed.

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*Manuel Garcia, Plaintiff in error, *v.* Samuel Lee. [*511

Florida treaty.

The decision of the court in the case of Foster *v.* Neilson, 2 Pet. 254, by which grants made by the crown of Spain, after the treaty of St. Ildefonso, of lands west of the river Perdido, and which were by the United States declared to be within the territory of Louisiana, ceded by France to the United States, were declared void, affirmed.

Congress, in order to guard against imposition, declared, by the law of 1804, that all grants of land made by the Spanish authorities, in the territory west of the Perdido, after the date of the treaty of St. Ildefonso, should be null and void; excepting those to actual settlers, acquired before December 26th, 1803.

The controversy in relation to the country lying between the Mississippi and the Perdido rivers, and the validity of the grants made by Spain in the disputed territory, after the cession of

Louisiana to the United States, were carefully examined and decided in the case of Foster *v.* Neilson. This court, in that case, decided, that the question of boundary between the United States and Spain was one for the political departments of the government; that the legislative and executive branches having decided the question, the courts of the United States were bound to regard the boundary determined by them as the true one; that grants made by the Spanish authorities, of lands, which, according to this boundary line, belonged to the United States, gave no title to the grantees, in opposition to those claiming under the United States, unless the Spanish grants were protected by the subsequent arrangements made between the two governments; and that no such arrangements were to be found in the treaty of 1819, by which Spain ceded the Floridas to the United States, according to the fair import of its words, and its true construction.

In the case of Foster *v.* Neilson, this court said, that the Florida treaty of 1819 declares, that all grants made before the 24th January 1818, by the Spanish authorities, "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty;" and in deciding the case of Foster *v.* Neilson, the court held, that even if this stipulation applied to lands in the territory in question, yet the words used did not import a present confirmation, by virtue of the treaty itself, but that they were words of contract; "that the ratification and confirmation which were promised, must be the act of the legislature; and until such shall be passed, the court is not at liberty to disregard the existing laws on the subject." Afterwards, in the case of the United States *v.* Percheman, 7 Pet. 86, in reviewing the words of the eighth article of the treaty, the court, for the reasons there assigned, came to a different conclusion; and held, that the words were words of present confirmation, by the treaty, where the land had been rightfully granted before the cession; and that it did not need the aid of an act of congress to ratify and confirm the grant. This language was, however, applied by the court, and was intended to apply, to grants made in a territory which belonged to Spain, at the time of the grant; the case then before the court was one of that description; it was in relation to a grant of land in Florida, which unquestionably belonged to Spain, at the time the grant was made; and where the Spanish authorities had an un-

*512] doubted right to grant, until the treaty *of cession in 1819; it is of such grants, that the court speak, when they declare them to be confirmed and protected by the true construction of the treaty; and that they do not need the aid of an act of congress to ratify and confirm the title of the purchaser. The court do not apply this principle to grants made within the territory of Louisiana; the case of Foster *v.* Neilson must, in all other respects, be considered as affirmed by the case of Percheman; as it underwent a careful examination in that case, and as none of its principles were questioned, except that referred to.

The leading principle in the case of Foster *v.* Neilson, which declares that the boundary line determined on as the true one by the political departments of the government, must be recognised as the true one by the judicial departments, was, after that case, directly acknowledged and affirmed by this court, in 1832, in the case of the United States *v.* Arredondo, 8 Pet. 711; and this decision was given by the court, with the same information before them as to the meaning of the Spanish side of the treaty, which is mentioned in the case of Percheman.

Error to the District Court for the Eastern District of Louisiana. In the district court of Louisiana, the plaintiff in error, a resident in Cuba, on the 26th January 1836, filed a petition, stating, that on the 1st of September 1806, he purchased of the Spanish government, for a valuable consideration, and was put into possession of the same, 16,000 arpents of land, divided into three tracts or parcels, having such marks and bounds as are laid down in the original plots and surveys annexed to the deed of sale, by Juan Ventura Morales, then intendant of the Spanish government, dated the 5th day of September 1806. Certified copies of the deed of sale, plots and surveys were annexed to the petition. The petition stated, that Samuel Lee, a resident in the parish of Feliciana, and a citizen of the state, had taken possession of 10,000 arpents, part of the said grant, which was situated in the now state of Louisiana; and refused to deliver up the same. The petitioner prayed to be put in possession of the said land, &c.

On the 17th day of May 1836, Samuel Lee filed an answer and exception to the plaintiff's petition, in which he denied "all and singular the allegations in the plaintiff's petition herein exhibited against him, and will, on trial, require strict and legal proof of the same; and especially does he deny any jurisdiction of the Spanish government over the territory in which the land claimed by the plaintiff is situated, at the time the grant exhibited by him was made, or at any time subsequent thereto; and strictly denies the right of the said *government, or the officers thereof, to make grants or sales of land therein." [*513

On the 27th of February 1837, the district court of Louisiana entered a judgment in favor of the defendant; and the plaintiff prosecuted this appeal.

At the hearing of this case in the district court, certain documentary evidence was offered by the plaintiff, which was not received by the court; and the plaintiff took an exception to the rejection of the same. This bill of exceptions, containing all the documents offered and rejected in the court below, was sent up with the record.

The case was argued by *McCaleb* and *Southard*, for the plaintiff in error; and by *Jones*, for the defendant.

The counsel for the *plaintiff* in error asked a reversal of the judgment of the district court of Louisiana, on the following grounds:

1. The grant or sale to the plaintiff was made at a period when the territory between the Mississippi and Perdido was in the actual possession and under the jurisdiction and sovereignty of the crown of Spain.

2. Great Britain was the first nation that exercised authority over said territory, in a sovereign capacity; France asserted pretensions to it, until the ratification of the treaty of 1763, by which she finally and for ever surrendered them to Great Britain: and consequently, the said territory could not have been, and was never intended to be ceded by France to Spain, by a treaty of the same date, to wit, 1763, as part of Louisiana.

3. The said territory was never called a part of Louisiana by any nation except France; and after the final relinquishment of all her right and title, it was owned and possessed by Great Britain, as part of her West Florida, until the treaty of 1783; when it was ceded by her as such to Spain, as a conquered country.

4. The said territory formed no part of Louisiana, as retroceded by Spain to France, by the treaty of St. Ildefonso, of 1800; nor of Louisiana, as ceded by France to the government of the United States, by the treaty of Paris, of 1803.

5. Spain never finally relinquished her right and title to the said territory, until the ratification of the treaty of 1819, which was expressly a treaty for the settlement of all the pretensions of the governments of the United States and Spain; and which expressly *confirms all grants made by the Spanish government, prior to the 24th of January 1818, situated [*514 in all the territories to the eastward of the Mississippi, known by the name of East and West Florida.

Jones, for the defendant, contended, that the only exception to the decision of the district court was on a point of evidence; namely, the admissi-

bility, as evidence to the jury, of certain papers, seventeen in number. The only possible tendency of those papers; indeed, the sole and professed object of their introduction, was, to expound the meaning, operations and effect of the treaty concluded at Paris, April 30th, 1803, by which France ceded to this country the province of Louisiana. The particular question which those papers were intended to affect, was one purely of the true construction of the treaty; and that was, whether the eastern limit of the ceded territory was bounded by the Mississippi, or extended to the Perdido; a question, in time past, of extensive, animated and protracted discussion between the governments of Spain and the United States; but practically solved by the latter, who took actual possession of the territory, within the disputed limits, as part and parcel of the territory ceded by the treaty; definitively incorporated the whole of it with the territory of the United States, and annexed a part of it to the state of Louisiana; all under the sole authority of that treaty, and with no other title or pretence of title whatever.

We maintain the decision of the district court, ruling out these papers as evidence, upon the following grounds: 1. If this were a question of fact proper to be left to a jury, on extrinsic evidence, the papers in question were not competent evidence of the fact. 2. It is not now, nor was it ever, such a question; but was always, so long as it remained open to any sort of controversy, one of construction, completely determinable by the words of the treaty, either taken by itself, or in connection with circumstances of equal notoriety; and equally within the proper sphere of judicial cognisance. 3. Maintaining, as we do, the sufficiency of the reasons upon which the claim to this territory was originally asserted on behalf of the United States, we nevertheless deny that it is, or ever was, a question of judicature; and affirm,

*515] that as a question of sovereign right *between the two nations, it came originally, and has ever remained, within the peculiar province of such departments of the government as are charged with the management of our foreign relations, and with the highest functions of sovereignty, in asserting and maintaining national rights against foreign powers; and as such a question, that it has been long ago conclusively terminated and settled, by a series of public acts, in which the executive and legislative powers of the government have concurred to assert and establish the territorial sovereignty and rights of the nation, by the supreme authority of the nation; an authority which no private rights of property, founded in any conflicting rules of municipal law, can oppose; which is supreme over all the people and all the tribunals of the country; and which this court has judicially recognised and deferred to, as supreme and incontrovertible.

Taney, Ch. J., delivered the opinion of the court.—In this case, the appellant claims 10,000 arpents of land, being part of a grant for 15,000 arpents; which he alleges, in his petition, were granted to him by the Spanish authorities, in 1806. The land is situated in the state of Louisiana, and in the territory lying north of the Iberville, and between the Perdido and the Mississippi; which was so long a subject of controversy between the United States and Spain; and which was finally settled by the cession of the Floridas to the United States, by the treaty of February 22d, 1819.

It is well known, as a matter of history, that the executive and legislative departments of our government have continually insisted, that the true boundary of Louisiana as we acquired it by the treaty with France, of the 30th of April 1803, extended to the Perdido; that the claim of the United States was disputed by Spain; and that she refused to deliver the territory, and claimed a right to exercise the powers of government over it; which claim the United States denied. On the 29th of March 1804, congress passed a law dividing Louisiana into two territorial governments; and in order to protect the interest of the United States in the disputed territory, the 14th section of this law enacts, that all grants for lands within the territories ceded by "the French republic to the United States, by the treaty of the 30th April 1803, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown, government or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever *nature, towards the obtaining of any grant, title or claim to such lands, and under [*516 whatsoever authority transacted or pretended, be and the same are hereby declared to be, and to have been from the beginning, null and void, and of no effect in law or in equity," The titles of actual settlers, acquired before the 20th of December 1803, are excepted by a proviso from the operation of this section.

The grant under which the appellant, Garcia, claims, falls within the provisions of this section; and as this law of congress has never been repealed or modified in relation to grants made by the Spanish authorities, the appellant has no title at law or in equity; unless it can be shown, that the act of congress in question, upon some ground or other, is void or inoperative; and that the courts of the United States are bound to recognise a title acquired in opposition to its provisions.

The questions presented by the record before us, are not new in this court. They were examined and considered in the case of *Foster* v. *Neilson*, decided here in 1829, and reported in 2 Pet. 254. In that case, the land in dispute was granted by the Spanish governor, on the 2d of January 1804, and ratified by the king of Spain, on the 29th of May 1804. The controversy in relation to the country lying between the Mississippi and the Perdido; and the validity of the grants made by Spain in the disputed territory, after the cession of Louisiana to the United States, were carefully examined and decided in that case; and all of the facts and arguments necessary to a correct decision were then before the court. They are substantially the same with those now offered to support the claim of the appellant; and are so fully set forth in the report of that case, that it is unnecessary here to repeat them. This court then decided, that the question of boundary between the United States and Spain, was a question for the political departments of the government; that the legislative and executive branches having decided the question, the courts of the United States were bound to regard the boundary determined on by them, as the true one. That grants made by the Spanish authorities, of lands, which, according to this boundary line, belonged to the United States, gave no title to the grantees, in opposition to those claiming under the United States; unless the Spanish grants were protected by the subsequent arrangements made between the two governments; and that no such arrangements were to be found in the treaty of 1819, by which Spain ceded the Floridas to the Uni-

ted States, according to the fair *import of its words and its true construction. These positions have all been controverted in the argument at the bar, in the case now before us. But we do not think it necessary, in deciding the case, to enter upon a discussion of the various topics pressed upon the attention of the court; and shall content ourselves with extracting several portions of the opinion delivered by Chief Justice MARSHALL, in the case of *Foster* v. *Neilson*, in order to show that all of the points now raised were carefully considered and decided in the case referred to. In page 309 of 2 Peters' reports, the chief justice states the opinion of the court, in the following words:

"After these acts of sovereign power (by the United States) over the territory in dispute, asserting the American construction of the treaty, by which the government claims it; to maintain the opposite construction in its own courts, would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted; it is not in its own courts that this construction is to be denied. A question like this, respecting boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. Had this suit been instituted, immediately after the passage of the act for extending the bounds of Louisiana, could the Spanish construction of the treaty of St. Ildefonso have been maintained? Could the plaintiff have insisted, that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful; and that his title under a Spanish grant must prevail; because the acts of congress on the subject were founded on a misconstruction of the treaty? If it be said, that this statement does not present the question fairly, because a plaintiff admits the authority of this court, let the parties be changed. If the Spanish grantee had obtained possession, so as to be the defendant, would a court of the United States maintain his title, under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle, that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would, we think, *have subverted those principles *518] which govern the relations between the legislature and judicial departments, and mark the limits of each. If the rights of the parties are in any degree changed, that change must be produced by the subsequent arrangements made between the two governments."

After having thus fully expressed the opinion, that the court were bound to recognise the boundary of Louisiana, as insisted on by the legislature of the United States; and that the American grants of land must prevail over those made by the Spanish authorities, after the date of the treaty of St. Ildefonso, unless "the rights of the parties had been changed by subsequent arrangements made between the two governments;" the court, in the same case, proceed to examine whether the validity of these grants was recognised by the United States, or provided for in the treaty of 1819. And after examining the articles of the treaty, which had been relied on in the argu-

ment as providing for the grants made by the Spanish authorities, the opinion of the court, on that part of the case, is stated by the chief justice in the following words: "It is not improbable, that terms were selected, which might not compromise the dignity of either government; and which each might understand, consistently with its former pretensions. But if a court of the United States would have been bound, under the state of things existing on the signature of the treaty, to consider the territory, then composing a part of the state of Louisiana as rightfully belonging to the United States, it would be difficult to construe this article into an admission that it belonged, rightfully, to his Catholic Majesty." It had also been contended in argument, in that case, that the exception of certain large grants of land by name (which had been made by the Spanish government), in the ratification of the treaty of Spain, implied that other fair grants were to be obligatory on the United States. But the court held otherwise, and say: "The form of this ratification ought not, in their opinion, to change the natural construction of the words of the eighth article, or extend them to embrace grants not otherwise intended to be confirmed by it. An extreme solicitude to provide against injury or inconvenience from the known existence of such large grants, by insisting upon a declaration of their absolute nullity, can, in their opinion, furnish no satisfactory proof that the government meant to recognise the small grants as valid; which, in every previous act and struggle, *it had proclaimed to be void, as being for lands within the American territory." [*519

Such were the opinions and language of this court, in the case of *Foster* v. *Neilson*. It is true, that upon another and different point from those above mentioned, an opinion expressed in that case, was, afterwards, upon information subsequently obtained, overruled; and in order to prevent misconstruction, it may be proper to state it. It was this: the eighth article of the treaty of 1819, declares that all grants made before the 24th of January 1818, by the Spanish authorities, "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty." And in deciding the case of *Foster* v. *Neilson*, the court held, that even if this stipulation applied to lands in the territory in question, yet the words used did not import a present confirmation, by virtue of the treaty itself; but that they were words of contract between the two nations, and that "the legislature must execute the contract;" "that the ratification and confirmation which are promised, must be the act of the legislature;" and "until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject." Afterwards, in the case of the *United States* v. *Percheman*, 7 Pet. 86, in reviewing these words of the eighth article of the treaty, the court, for the reasons then assigned, came to a different conclusion, and held, that the words used, were words of present confirmation, by the treaty, where the land had been rightfully granted, before the cession; and that it did not need the aid of an act of congress to ratify and confirm the grant. This language was, however, applied by the court, and intended to apply, to grants made in a territory which belonged to Spain at the time of the grant. The case before the court was one of that description. It was in relation to a grant of land in Florida, which unquestionably belonged to Spain, at the time the grant was made; and

where the Spanish authorities had an undoubted right to grant, until the treaty of cession in 1819. It is of such grants, that the court speak, when they declare them to be confirmed and protected by the true construction of the treaty; and that they do not need the aid of an act of congress to ratify and confirm the title of the purchaser. But they do not, in any part of the last-mentioned case, apply this principle to grants made by Spain, within the limits of Louisiana, in the territory which belonged to the United States,
*520] *according to its true boundary; and where Spain had no right to grant lands, after the cession to France by the treaty of St. Ildefonso, in 1800, as hereinbefore mentioned. On the contrary, although the court, in the case of the *United States* v. *Percheman*, refer to the case of *Foster* v. *Neilson*, and carefully explain the reasons which led them to change their opinion as to the true construction of the words "shall be confirmed," in the eighth article of the treaty; yet they use no expression from which it can be inferred, that the opinion of the court had changed in relation to any other principle decided in *Foster* v. *Neilson*. And as that case was then under review, and manifestly, at that time, underwent a careful examination by the court, and as none of its principles were questioned except the one above mentioned; the case of *Foster* v. *Neilson* must, in all other respects, be considered as affirmed by that of the *United States* v. *Percheman*. Indeed, we are not aware of any case in which its authority has been doubted by the court, in any of its principles, with the single exception above mentioned. Expressions may, perhaps, be found, in some opinions delivered here, which, detached from the case under consideration, might create some doubt upon the subject. But these expressions must always be taken with reference to the particular subject-matter in the mind of the court; and when this just rule of construction is appelled to the language used, it will be found, that there is no case in which the court ever designed to shake the authority of the case now relied on, or to question the principles there decided, further than is herein before stated. So far from it, the leading principle of the case, which declares that the boundary line determined on as the true one by the political departments of the government, must be recognised as the true one by the judicial department, was subsequently directly acknowledged and affirmed by this court, in 1832, in the case of the *United States* v. *Arredondo*, 6 Pet. 711. And this decision was given with the same information before them as to the meaning of the Spanish side of the treaty, which is mentioned in the case of Percheman; and consequently, that information could not have shaken the confidence of the court in any of the opinions pronounced in *Foster* v. *Neilson*, further than has been already stated.

In this view of the subject, the case of *Foster* v. *Neilson* decides this case. It decides, that the territory in which this land was situated belonged
*521] to the United States, at the time that this *grant was made by the Spanish authority; it decides, that this grant is not embraced by the eighth article of the treaty, which ceded the Floridas to the United States; that the stipulations in that article are confined to the territory which belonged to Spain at the time of the cession, according to the American construction of the treaty; and that the exception of the three grants made in the ratification of this treaty, by the king of Spain, cannot enlarge the meaning of the words used in the eighth article; and cannot, in the language of the court, "extend them to embrace grants not otherwise

intended to be confirmed ;" or grants " which it (the American government) had proclaimed to be void, as being for lands within the American territory." These principles, thus settled by this court, cover the whole ground now in controversy.

Indeed, when it is once admitted, that the boundary line according to the American construction of the treaty, is to be treated as the true one, in the courts of the United States, it would seem to follow, as a necessary consequence, that the grant now before the court, which was made by the Spanish authorities, within the limits of the territory which then belonged to the United States, must be null and void ; unless it has been confirmed by the United States, by treaty or otherwise. It is obvious, that one nation cannot grant away the territory of another ; and if a proposition so evident needed confirmation, it will be found in the case of *Poole* v. *Fleeger*, 11 Pet. 210. In that case, there had been a disputed boundary between two states ; and the parties claimed the same land under grants from different states. The boundary line had been ascertained by compact between the states, after the grants were made. And in deciding between the clamants in that case, this court said : " In this view of the matter, it is perfectly clear that the grants made by North Carolina and Tennessee, under which the defendant claimed, were not rightfully made, because they were originally beyond her territorial boundary ; and that the grant under which the claimants claim was rightfully made, because it was within the territorial boundary of Virginia." And again, " if the states of North Carolina and Tennessee could not rightfully grant the land in question, and the states of Virginia and Kentucky could ; the invalidity of the grants of the former arises, not from any violation of the obligation of the grant, but from an intrinsic defect of title in the states."

In the case before us, the grant is invalid from " an intrinsic defect " in the title of Spain. It is true, that she still claimed the country, *and refused to deliver it to the United States. But her conduct was, in [*522 this respect, in violation of the rights of the United States, and of the obligation of treaties. The United States did not immediately take forcible possession, as they might justly have done ; and preferred a more pacific and magnanimous policy towards a weaker adversary. Yet their forbearance could, upon no just grounds, impair their rights, or legalize the wrongful grants of Spain, made in a territory which did not belong to her ; for the authorities of the United States made known, by every means in their power, their inflexible determination to assert the rights of this country ; and congress, in order to guard against imposition and injustice, declared by law, in 1804, that all grants of land made by the Spanish authorities, after the date of the treaty of St. Ildefonso, would be null and void ; excepting only those to actual settlers, acquired before December 20th, 1803.

The present appellant procured his title from Spain, after the passage of this law. The land granted to him belonged, not to Spain, but to the United States ; and notice had been given in the most public and authentic manner, that the Spanish grants would confer no title, before the appellant obtained his grant. Upon what ground of law or equity, then, can the United States be now required to make good this grant? They had done nothing to mislead him, but had taken every measure to warn him and every one else that they would not submit to have the soil which belonged to the

United States granted away by a foreign power. If he has been deceived, he has either deceived himself, or been misled by the Spanish authorities; and has no right to complain of the conduct of the United States. And if either Spain or the United States intended to provide for these grants in Louisiana, by the treaty ceding the Floridas; it is impossible to believe, that words would not have been used which clearly embraced them, and would have left no doubt as to the intention of the parties to the treaty.

If, therefore, this were a new question, and had not already been decided in this court, we should be prepared now to adopt all of the principles affirmed in *Foster* v. *Neilson*, with the exception of the one since overruled in the case of the *United States* v. *Percheman*, as hereinbefore stated. The questions, however, are not new ones in relation to these grants. The same principles have been sanctioned by the legislative, executive and judicial departments of the government; and they must be regarded as too well
*523] *settled to be now disturbed; and we think the court below were right in rejecting the testimony stated in the exception; which, if even properly authenticated, could not, upon established principles, have shown title in the appellant under a Spanish grant made in 1806. The judgment of the district court is, therefore, affirmed.

Baldwin, Justice, dissented.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

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*524] *Amos Kendall, Postmaster-General of the United States, Plaintiff in error, *v.* United States, on the relation of William B. Stokes *et al.*

Mandamus.—Executive authority.—District of Columbia.—British statutes.—Jurisdiction.

Contracts for carrying the mail of the United States were made by S. & S., with the postmaster-general of the United States, out of which certain allowances and credits were made in favor of S. & S., by that officer; and the amount of the same was passed to the credit of S. & S., with the general post-office; the successor of the postmaster-general struck out the allowances and credits in the accounts, and thus a large sum of money was withheld from the contractors; S. & S. presented a memorial to congress; and an act was passed, authorizing and directing the solicitor of the treasury of the United States to settle and adjust the claims of S. & S., according to the principles of equity; and directing the postmaster-general to credit S. & S. with whatever sum of money the solicitor should decide should be due to them. The solicitor of the treasury made a decision on the claims of S. & S., and communicated the same to the postmaster general; who, thereupon, carried to the credit of S. & S. a part, but refused to credit a part, of the amount allowed by the solicitor; S. & S. applied to the President of the United States, who referred the subject to congress; and the senate of the United States determined, that no further legislation on the subject was necessary, and that the decision of the solicitor of the treasury ought to be complied with by the postmaster-general. The postmaster-general continued to withhold the credit; S. & S. applied to the circuit court of the United States for the district of Columbia, for a *mandamus*, to be directed to the postmaster-general, commanding him to credit them with the amount found to be due to them from the

United States, according to the decision of the solicitor of the treasury; a peremptory *mandamus* was finally ordered, and the postmaster-general brought the case before the supreme court by a writ of error. It has been considered by the counsel on the part of the postmaster-general that this is a proceeding against him to enforce the performance of an official duty, and the proceeding has been treated as an infringement on the executive department of the government; which has led to a very extended range of argument on the independence and duties of that department; but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceeding in this case interferes, in any respect whatever, with the rights and duties of the executive; or that it involves any conflict of powers between the executive and judicial departments of the government; the *mandamus* does not seek to direct or control the postmaster-general in the discharge of his official duty, partaking, in any respect, of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control. The judgment of the circuit court was affirmed.[1]

By the act of congress directing the solicitor of the treasury to adjust and settle the accounts of S. & S., the postmaster-general is vested with no discretion or control over the decision of the solicitor; nor is any appeal or review of that decision provided for by the act; the term of the submission was a matter resting entirely in the discretion of congress; and if they thought proper to vest such a *power in any one, and especially, as the arbitrator was an officer [*525
of the government; it did not rest with the postmaster general to control congress or the solicitor, in that affair. It is unnecessary to say how far congress might have interfered by legislation, after the report of the solicitor; but if there was no fraud or misconduct in the arbitrator (of which none is pretended or suggested), it may well be questioned, whether S. & S. had not acquired such a vested right as to be beyond the power of congress to deprive them of it.

The right of S. & S. to the full amount of the credit, according to the report of the solicitor of the treasury, having been ascertained and fixed by law; the enforcement of that right falls properly within judicial cognisance.

It was urged at the bar, that the postmaster-general was alone subject to the direction and control of the President of the United States with respect to the execution of the duty imposed on him by the law under which the solicitor of the treasury acted; and this right of the president was claimed as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This doctrine cannot receive the sanction of this court; it would be vesting in the president a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results to all cases falling within it, would be clothing the president with a power to control the legislation of congress, and paralyze the administration of justice.

To contend, that the obligations imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and is entirely inadmissible.[2]

The act required by the law to be done by the postmaster-general is, simply to credit S. & S. with the full amount of the award of the solicitor of the treasury; this is a precise, definite act, purely ministerial, and about which the postmaster-general has no discretion whatever. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of the court, pursuant to an order of the court, is an official act; there is no room for the exercise of discretion, official or otherwise; all that is shut out by the direct and positive command of the law; and the act required to be done is, in every just sense, a mere ministerial act.[3]

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[1] But a *mandamus* will not lie to the head of a department, to enforce the performance of an executive duty; involving the exercise of judgment and discretion. Decatur *v.* Paulding, 14 Pet. 497; Brashear *v.* Mason, 6 How. 92; United States *v.* Seaman, 17 Id. 225; Gaines *v.* Thompson, 7 Wall. 347; Secretary *v.* McGarrahan, 9 Id. 298. See Reeside *v.* Walker, 11 How. 272

[2] The president cannot be enjoined from carrying into effect an act of congress, on the ground of its alleged unconstitutionality. Mississippi *v.* Johnson, 4 Wall. 475.

[3] So, when a patent for land has been duly signed, sealed, countersigned and recorded, the ministerial duty of delivering the instrument will be enforced by *mandamus*. United States *v.* Schurz, 102 U. S. 378.

The common law, as it was in force in Maryland, when the cession of the part of the state within the district of Columbia, was made to the United States, remained in force in the district. The writ of *mandamus* which issued in this case, in the district court of the district of Columbia, must be considered as it was at common law, with respect to is object and purpose; and varying only in the form required by the different character of the government of the United States. It is a writ, in England, issuing out of the king's bench, in the name of the king, and is called a prerogative writ, but considered a writ of right; aud is directed to some person, corporation, or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office, and which is supposed to be consonant to right and justice; and where there is no other adequate specific remedy, such a writ, and for such a purpose, would seem to be peculiarly appropriate to the present case. The right claimed is just and established by positive law; and the duty required to be performed is clear and specific; and there is no other adequate remedy.

*526] The cases of McIntire *v.* Wood, 7 Cranch 504, and McClung *v.* Silliman, 6 Wheat. *598, have decided, that the circuit courts of the United States, in the several states, have no power to issue a *mandamus* against one of the officers of the United States.[1]

The result of the cases of McIntire *v.* Wood, and McClung *v.* Silliman clearly is, that the authority to issue the writ of *mandamus* to an officer of the United States, commanding him to perform a specific act, required by a law of the United States, is within the scope of the judicial powers of the United States, under the constitution; but that the whole of that power has not been communicated by law to the circuit courts of the United States in the several states; it is a dormant power, not yet called into action and vested in those courts. There is nothing growing out of the official character of a party, that will exempt him from this writ, if the act to be performed is merely ministerial.

It is a sound principle, that in every well-organized government, the judicial powers should be co-extensive with the legislative; so far, at least, as they are to be enforced by judicial proceedings.

There is, in the district of Columbia, no division of powers between the general and state governments; congress has the entire control over the district, for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department in this district, all the judicial power necessary for the purposes of government would be vested in the courts of justice. The circuit court in the district is the highest court of original jurisdiction; and, if the power to issue a *mandamus* in such a case as that before the court exists in any court, it is vested in that court.[2]

At the date of the act of congress establishing the government of the district of Columbia, the common law of England was in force in Maryland; and, of course, remained and continued in force in the part of the district ceded by Maryland to the United States. The power to issue a *mandamus* in a proper case, is a part of the common law; and it has been fully recognized as in practical operation, in a case decided in the court of that state.

The power to issue the writ of *mandamus* is, in England, given to the king's bench, only as having the general supervising power over all inferior jurisdictions and officers; and is co-extensive with judicial power. And the same theory prevails in the state governments of the United States, where the common law is adopted, and governs in the administration of justice; and the power of issuing this writ is generally confided to the highest court of original jurisdiction.[3]

There can be no doubt, but that, in the state of Maryland, a writ of *mandamus* might be issued to an executive officer, commanding him to perform a ministerial act required of him by the laws; and, if it would lie in that state, there can be no good reason why it should not lie in the district of Columbia, in analogous cases.

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[1] See Bath County *v.* Amy, 13 Wall. 244. It required a special statute to enable the circuit courts to issue writs of *mandamus* to the Pacific Railroad Company. 17 U. S. Stat. 509; 1 R. S. § 5262. See Union Pacific Railroad Co. *v.* Hall, 91 U. S. 343.

[2] This proposition has since been repeatedly upheld by the supreme court, and is no longer an open question. United States *v.* Schurz, 102 U. S. 393.

[3] It has since been determined, that the writ of *mandamus* does not issue in virtue of any prerogative power; but in modern practice is nothing more than an ordinary action at law, in cases where it is the appropriate remedy. Kentucky *v.* Dennison, 24 How. 66.

Kendall v. United States.

The powers of the supreme court of the United States, and of the circuit courts of the United States to issue writs of *mandamus*, granted by the 14th section of the judiciary act of 1789, is only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed; the *mandamus* does not direct the inferior court how to proceed, but only that it must proceed, according to its own judgment, to a final determination; otherwise it cannot be reviewed in the appellate court. It is different in the circuit court of the district of Columbia, under the adoption of the laws of Maryland, which included the common law.

The power of the circuit court of the district of Columbia to exercise the jurisdiction to issue a writ of *mandamus* to a public officer to do an act required of him by law, results from the 3d section of the act of congress of February 27th, 1801, *which declares, that the court and the judges thereof shall have all the power by law vested in the circuit courts of the United States. The circuit courts referred to were those established by the act of February 13th, 1801; the repeal of that law, fifteen months afterwards, and after the circuit court for this district had been organized, and had gone into operation, under the act of 27th February 1801, could not, in any manner, affect that law any further than was provided by the repealing act. [*527

It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes; and this has been the course by legislation in congress, in many instances, when state practice and state process has been adopted. Such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it; and such must, necessarily, be the effect and operation of such adoption.

No court can, in the ordinary administration of justice, incommon-law proceedings, exercise jurisdiction over a party, unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process; such process cannot reach the party beyond the territorial jurisdiction of the court. This is a personal privilege, which may be waived by appearance; and if advantage is to be taken of it, it must be by plea, or some other mode, at an early stage of the cause.

United States *v.* Kendall, 5 Cr. C. C. 163, affirmed.

Error to the Circuit Court of the District of Columbia, for the county of Washington. On the 26th day of May 1837, William B. Stokes, Richard C. Stockton, Lucius W. Stockton and Daniel Moore, presented a petition to the circuit court of the district of Columbia, for the county of Washington, stating, that under contracts duly and legally made by them with the late William T. Barry, then postmaster-general of the United States, and duly authorized by law, they were entitled to certain credits and allowances on their contracts for the transportation of the mail of the United States; that the credits and allowances were made and given to them on their contracts, and amounts of money actually paid on such accounts; that some time in 1835, William T. Barry resigned his situation as postmaster-general, and Amos Kendall was appointed to the office; that after he had entered on the duties of his office, he undertook to re-examine the contracts entered into by his predecessor, and the credits and allowances made by him; and ordered and directed the allowances and credits to be withdrawn, and the petitioners re-charged with divers payments they had received. The petitioners stated, that they were dissatisfied with these proceedings of Amos Kendall, as postmaster-general; and believing he had *exceeded his authority, and being unable to adjust their differences with him, they addressed a memorial to the congress of the United States. A copy of the memorial was annexed to the petition. [*528

The memorial stated, at large, all the circumstances which the petitioners considered as affecting their case; the proceedings of the postmaster-general in the matter; and the heavy grievances done to the memorialists by the

course adopted by the postmaster-general. They asked such proceedings on the part of congress as its wisdom and justice might direct.

The petition stated, that congress passed an act, which was approved by the president of the United States on the 2d of July 1836, which act provided, "that the solicitor of the treasury be and he is hereby authorized and directed to settle and adjust the claims of William B. Stokes, Richard C. Stockton, of Maryland, and Lucius W. Stockton and Daniel Moore, of Pennsylvania, for extra services performed by them, as contractors for carrying the mail, under and by virtue of certain contracts therefor, alleged to have been made and entered into with them by William T. Barry, late postmaster-general of the United States; and for this purpose, to inquire into, and determine the equity of the claims of them, or any of them, for or on account of any contract, or additional contract, with the said postmaster-general, on which their pay may have been suspended by the present postmaster-general; and to make them such allowances therefor, as upon a full examination of all the evidence, may seem right, according to the principles of equity; and that the said postmaster-general be and he is hereby directed to credit such mail contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them, for or on account of any such service or contract; and the solicitor is hereby authorized to take testimony, if he shall judge it to be necessary to do so; and that he report to congress, at its next session, the law and the facts upon which his decision has been founded: provided, the said solicitor is not authorized to make any allowance for any suspension or withholding of money by the present postmaster-general for allowances or over-payments made by his predecessor, on route No. 1371, from Philadelphia to Baltimore, for carrying the mail in steamboats, when it was not so carried by said Stockton & Stokes, but by the steamboat company; nor for any suspension or withholding of money as aforesaid, for allowances or over-payments made as aforesaid, for carrying an express mail from *Baltimore to York or Lancaster; nor for any suspension or withholding of money, as aforesaid, for allowances or over-payments, made as aforesaid, on route No. 1391, from Westminster to McConnerston, as described in the improved bid; nor for any suspension or withholding of money, as aforesaid, for allowances or over-payments, as aforesaid, on the route from Baltimore to Wheeling, for running a certain daily line to Hagerstown and Wheeling, from the first of September 1832, to the first of April 1833, when the line referred to only run tri-weekly; nor for any suspension or withholding of money, as aforesaid, for allowances or overpayments, made as aforesaid, on the route from Baltimore to Washington, under the contract of 1827: but nothing in this proviso shall prejudice any application they may make, hereafter, in reference to these routes, if they shall think it proper to make such application."

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The petition stated, that in pursuance and in execution of this act, Virgil Maxey, being solicitor of the treasury, did proceed to examine, adjust and settle the said claims; and on the 12th day of November 1836, did make out an transmit to the said Amos Kendall, postmaster-general, in part, his award and decision upon certain items of said claims so referred to him; and on the 23d of November 1836, he communicated to the postmaster-general his decision and award on the residue of the claims of the petitioners.

The decision of the solicitor of the treasury of the 12th of December 1836, after stating the particular items of account, from which the balances arose, was as follows: "I, therefore, in pursuance of the authority conferred on me, by the above mentioned act of congress, make allowance to said Richard C. Stockton, for his said claims up to the 1st of April 1835, of the above sum of $83,278. I, also, by virtue of the same authority, make allowance to said Stockton, for his said claims for extra services, from the 1st of April to 31st of December 1835, of the said sum of $26,862. A claim for interest having been made, I have postponed the consideration of it, until the equity of the other claims of the gentlemen *named in the title of the act, shall have been inquired into and determined." [*530

On the 22d of November 1836, the solicitor made a final award, which was also communicated by him to the postmaster-general. That award, after setting forth the items of the accounts presented and established in the judgment of the solicitor of the treasury against the United States, was: "I have examined the evidence touching the above claims, and find due to the petitioners, or to Richard C. Stockton, the following sums: For additional daily mail to Washington, $34,200. For compensation for carrying the mail in the spring of 1831, between Baltimore and Philadelphia, and for other services connected therewith, less $294, the sum of $11,796.16. Claims for interest, $4836.89, $1664.70, and $392.34.

The petitioners stated, that under and by virtue of the award of the solicitor of the treasury, they became entitled to have the sum of $162,727.05 carried to their credit; or, at least, after allowing some deductions therefrom made by the said solicitor, with their assent, the sum of $161.563.89, as the amount of principal and interest due to them by the terms of the award and decision. But the said postmaster general, although fully notified of the premises, and after a considerable delay, only so far obeyed and carried into execution the said act of congress and said award, as to direct and cause to be carried to the credit of the petitioners, the sum of $122,101.46, which said last-mentioned sum of money had been accordingly paid or credited to the petitioners; and he had from that time, and did still refuse, omit and neglect, notwithstanding the provisions of said act of congress, and the said award and decision of said solicitor of the treasury, so made, communicated and reported, as aforesaid, to pay or credit to the petitioners the residue of the said sum so awarded, being the sum of $39,462.43; or to credit or *pay to the petitioners, or either of them, the interest upon the said balance so unjustly and illegally withheld. [*531

The petition stated, that after the refusal, omission or neglect of Amos Kendall to execute his duty, by obeying the act of congress, in passing the amount awarded to his credit, the petitioners communicated the facts of their case to the president of the United States, requesting him to cause the said act of congress te be executed, who thereupon transmitted the same to Amos Kendall, the postmaster-general; and having received a reply to the same, stating why he had thus refused to comply with the award, and suggesting an application to congress for further legislation; the president, in December 1836, transmitted this reply to the petitioners, and in his communication said: "It appearing that there is a difference of opinion between the solicitor and the postmaster-general, upon the extent of the reference under the law to the solicitor, the postmaster-general having yielded to

what he believes to be all that was submitted by the law to the solicitor's decision, and paid the same ; but congress being now in session, and the best expounder of the intent and meaning of their own law, I think it right and proper, under existing circumstances, to refer it to that body for their decision. I deem this course proper, as the difference in opinion about the extent of the submission, under the law, arises between the head of the post-office department and the solicitor of the treasury ; and as it appears, the solicitor has reversed, in part, his decision and award."

The petitioners, in consequence of this correspondence, presented to congress a memorial, which, in the senate, was referred to the committee on the judiciary. The petition referred to the reports of the judiciary committee of the senate, of January 20th, 1837, and February 17th, 1837, and to the correspondence between the postmaster-general and the chairman of the committee ; copies of which were annexed to the petition. The concluding part of the report of the judiciary committee, of January 20th, 1837, was as follows :

"That congress intended the award of the solicitor to be final, is apparent, from the direction of the act, 'that the postmaster-general be and he is hereby directed to credit such mail contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them,' &c. If congress had intended to revise the decision of the solicitor, the postmaster-general would not have been directed to make the payment, without the intervention or further *action of congress." Unless it appeared, *532] which is not suggested by any one, that some cause exists which would vitiate or set aside the award between private parties before a judicial tribunal, the committee cannot recommend the interference of congress to set aside this award, and more especially, as it has been made by a high officer, selected by the government ; and the petitioners have been subjected to the trouble and expense of investigating their claims before a tribunal created by congress itself. It appears, that since the award was made by the solicitor, the postmaster-general has paid to the petitioners the sum of $129.938.30, leaving the balance of $40,625.59 unpaid, of the sums awarded in favor of the petitioners. From the view which the committee have taken, the conclusion at which the have arrived is, that the whole amount decided to be due and owing to the petitioners, by the solicitor of the treasury, ought to be paid to them out of the funds of the post-office department, according to the directions of the act, entitled, 'an act for the relief of William B. Stokes, Richard C. Stockton, Lucius W. Stockton and Daniel Moore ;' and that no further action of congress is necessary ; therefore, the committee recommend the adoption of the following resolution :

"Resolved, That the postmaster-general is fully warranted in paying, and ought to pay, to William B. Stokes and others, respectively, the full amount of the award of the solicitor of the treasury."

The report of February 17th, 1837, on the message of the president of the United States, of the 15th February 1837, with the accompanying documents in relation to the claims of Stockton & Stokes and others, contained the following : "The committee have considered the documents communicated, and cannot discover any cause for changing their opinion upon any of the principles advanced in their former report upon this subject ; nor the

correctness of their application to this case. They, therefore, recommended the adoption of the resolution heretofore reported by the committee."

The petition to the court proceeded to state, that the principal ground of the refusal, neglect and omission of the postmaster-general to execute and obey the act of congress and to give the petitioners credit for the full amount of the award of the solicitor of the treasury, was, as represented by him, that the said solicitor had transcended *the authority created and conferred on him by the act, in so awarding and deciding, [*533 whereas, the contrary was the fact; and the solicitor, on being apprised that a doubt existed as to the extent of his authority, did submit the said question to the attorney-general of the United States, to obtain his opinion. The opinion of the attorney-general confirmed the construction of the law given by the solicitor of the treasury.

The petition proceeded to state, that the "petitioners, conceiving and believing that they are entitled to have the whole sum so awarded by the said solicitor, passed to their credit on the books of the post-office department, and to receive the amount which, after the said entry, should appear justly due to them, with legal interest upon the balance, have applied to the said Amos Kendall, postmaster-general as aforesaid, to have the said credits so entered, and the said moneys so paid, which he has continually refused, and still refuses and neglects to do; and the congress of the United States will not pass any other or further law, as it is believed, merely because they have already passed one sufficient to meet the case; so that the only means of obtaining the money which is justly due to the petitioners, is, by application to your honorable court. Wherefore, your petitioners do respectfully pray, that your honors, the premises considered, will award the United States' writ of *mandamus*, to be directed to the said Amos Kendall, postmaster-general of the United States, commanding him—1. That he shall fully comply with, obey and execute the aforesaid act of congress, of July 2d, 1836, by crediting your petitioners with the full and entire sum so awarded, as aforesaid, in their favor, by the solicitor of the treasury, as aforesaid, in conformity with said award and decision. 2. That he shall pay to your petitioners the full amount so awarded, with interest thereon, deducting only the amount which shall be justly charged, or chargeable to your memorialists against the same."

On the 26th May 1837, the district court of the county of Washington made a rule in the case, on the motion of the relators, by their counsel: "That the said Amos Kendall, postmaster-general of the United States, show cause on Thursday, the first of June next, why the said writ of *mandamus* should not issue, as prayed by the said memorialists; and that a copy of this order be served on the said Amos Kendall, postmaster-general, as aforesaid." *A copy of the rule was served as directed; and was [*534 so certified by the marshal of the district of Columbia. Afterwards, on the 7th of June 1837, on the motion of the relators, by their counsel, the court ordered a *mandamus nisi*, to issue, directed to the postmaster-general; which writ was issued on the same day.

The *mandamus nisi*, after stating the proceedings which had taken place in the case, proceeded as follows: "Therefore, you are hereby commanded and enjoined, that immediately after the receipt of this writ, and without delay, you do fully comply with, obey and execute on your part,

the aforesaid act of congress, of 2d July 1836, by crediting said mail contractors with the full and entire sum so awarded and decided as aforesaid to be due to them, by the solicitor of the treasury, according to the true intent and meaning of the said award and decision; so that complaint be not again made to the said circuit court: and that you certify perfect obedience to, and due execution of, this writ to the said circuit court, on Saturday the tenth day of June instant; or that you do, at ten o'clock of that day, show cause to the said court, why you have not so done as commanded."

On the 10th of June 1837, the relators, by their counsel; and Amos Kendall, by his counsel, appeared in court; and further time was given, on motion, to Amos Kendall, to file his answer. On the 24th day of June 1837, the answer of the postmaster-general was filed. The answer contained the following causes "for declining obedience to the order of the court;" with a full argument upon each of them:

"1. It is doubted, whether, under the constitution of the United States, it confers on the judiciary department of the government, authority to control the executive department in the exercise of its functions, of whatsoever character.

"2. If, according to the constitution, the circuit court for the district of Columbia might be clothed by law to issue a *mandamus* in such a case, no such power has been conferred upon them by the act of congress.

"3. If, by the constitution, congress can clothe the courts with authority to issue writs of *mandamus* against executive officers, as such; and if they have vested the general power in this court by law; this is not a case in which that power can be lawfully exercised.

"*4. The court have ordered the postmaster-general to perform
*535] a legal impossibility."

To this answer of the postmaster-general, the opinion of the attorney-general of the United States, on the whole of the case, and sustaining the views of the postmaster-general, was annexed.

On the 13th July 1837, the circuit court ordered a peremptory *mandamus*, to be directed to the postmaster-general, to be issued. The postmaster-general prosecuted this writ of error.

The case was argued by *Key* and *Butler*, Attorney-General, for the plaintiff in error; and by *Coxe* and *Johnson*, for the defendants.

Key, for the appellant:—The record presents a case of conflict between two of the great depositories of the powers of government given by the constitution. The judiciary has assumed a power which the executive department resists. It is a power hitherto unknown to the judiciary—hitherto exercised by the executive alone, without question. It is a vast power. It annihilates one great department of the government, in one of its appropriate functions, if not all the departments; and vests, to a very considerable and undefined entent, all power in another.

1. The court below denies that there can be any such conflict. It has not only assumed the power, but fortified it by the doctrine, that it is to be unquestioned and irresistible. When the court speaks, "it is in the name of the United States," "it is the sovereign power that speaks," and "commands the proper executive officers to execute that judgment." And this

doctrine, it is thought by the court, cannot be opposed "without invoking principles which tend to set the executive authority above the restraints of law." As the court has, therefore, not merely assumed the power, but assumed it as a sovereign, making the assumption the proof of its supremacy; this doctrine, as to the effect of the assertion of the power, may be considered as necessarily connected with that which relates to its nature and validity; and certainly, if such is the effect of the power, it ought to be considered in such an inquiry.

We hold, that this doctrine, as to the effect of the power, is as indefensible as that which led to its exercise; that where the sentence of a court is brought to any other independent tribunal, to be carried *into execution, preliminary questions, from the nature of things, must [*536 present themselves to such other tribunal, which it alone must decide for itself; those questions are—Is this sentence I am asked to execute, within or beyond the jurisdiction of the court pronouncing it? Is it pronounced judicially or extra-judicially? If the former, further inquiry is inadmissible, for it is to be obeyed; if the latter, unnecessary, for it is a nullity. We hold this principle as applicable to all the distinct independent departments of our government. We hold, that to prescribe limits to power is idle, if the holder is to be the sole and unquestioned judge of what the limits are; if his possession of the power is conclusively proved by its assertion, he has unlimited power; and if any of the depositories of power under our constitution are placed on such an eminence, it is strange, that the framers of that instrument should have thought it necessary to make it so complicated. For, if a safe depository of such a power was found, the great secret was discovered; and the government might have been made extremely simple.

He did not understand any writer upon the constitution as having sanctioned such a doctrine; on the contrary, he should show the very highest authority for a directly contrary doctrine. That occasional conflicts and encroachments upon each other's sphere of powers by the different departments of the government, were expected to arise; and that it was thought a matter of security, that each was left to the independent maintenance of its own rights, and bound by duty to resist the invasions of the others. Here, then, is a conflict, and the parties to this conflict stand on ground of perfect equality; and the question is, where is the power in dispute? That one of the parties is a judicial tribunal, gives it no superiority. It must show its jurisdiction, by something more than assuming it. If it can show no other warrant for it, its sentence is a nullity.

Yet it must be admitted, there is a presumption in favor of the judiciary, in such a contest. And it is a just one, arising from a proper respect for judicial proceedings; and a persuasion that as the usurpation of power is the most unbecoming, so it is least of all to be expected there. Yet nothing human is infallible, and it may be found there. A court may mistake in deciding upon the extent of its own powers, as on any other question. It may honestly believe it has the power it *assumes; and such, no [*537 doubt, was the case with the court where this controversy has arisen.

The executive department of the government, upon whom this power was exerted, has felt bound to question it. It has used the means which the constitution and the laws have given it, to determine the course which,

under such circumstances, it ought to take; and cannot believe, that it would be justified in abandoning its duties to the power and control of any other department. We assert, therefore, that judicial encroachment is as liable to question as legislative or executive: and this power in every department to defend itself, and assert its own independence, we contend, is the undoubted doctrine of the constitution. Certainly, the constitution has assigned limits to the powers of all the departments; and leaves each, within its sphere, independent. Certainly, it is silent as to any such power being vested in either, as would enable it, without question, to encroach upon the powers of the others. He cited, to show not only that it was competent for the executive department of the government to resist, but that it was the duty to resist any encroachment by the judiciary: *Rose* v. *Himely*, 4 Cranch 269; 1 Wils. 407, 410, 411; Federalist, 51, No. 324; 2 Story on the Constitution 22–4; 3 Story 458–9; Elliott's Debates, Mr. Madison's Speech, 378; Speech of Mr. Ames, 397; 2 Dall. 410; 5 Wheat. app'x, 16; *Patterson* v. *United States*, 2 Wheat. 226.

He was gratified, that the contest was brought here. Here, where all encroachments upon the constitution would be brought to the same impartial test; where this high tribunal would watch with double vigilance, and rebuke, with all its dignity, judicial encroachment; and he trusted it would be seen, that this instance of judicial wrong would here receive judicial correction. They would show, he thought, in this appeal, a case in which the circuit court had assumed, for the first time, a power that had not been and could not be given to it. He charged it as no wilful usurpation; and believed it to be only a most unfortunate and a most extraordinary error of judgment. That power, as appears from its application by the court and from their own statement of it, amounts to this: "The power to direct and compel by *mandamus* the official action of every public officer where individual rights are concerned." Such appears to be the principle
*538] from the case to which it has *been applied. What is that case? He referred to the petition of the relators to the court; to the act of congress for their relief; their letter to the president; the president's letter to the relators referring their complaint to congress; and their memorial thereupon to congress.

These documents, exhibited by the relators themselves, show, that when the postmaster-general refused to allow them a further credit on the award, they called on the president, under his constitutional power to take care that the laws were faithfully executed, to require the postmaster-general to execute this law, by giving them the further credit required. And that, when the president took the case into consideration, he referred it to congress to pass an explanatory act; and that one house of congress, the senate, took up the case; and in the language of the petition, "will not pass any further law, as there is already a sufficient one." Now, this is the case of the relators, by their own showing. Where is it? Certainly, not before the postmaster-general. They appealed from his decision to the president; and he referred it, as he had a right to do, to congress; and the relators acquiesce in this reference, and present their petition to congress, and say, in their petition to the court, "that congress will not pass another law."

To whom, then, should the *mandamus* go? if to any. The postmaster

general was discharged of the case. It should go to congress or to the president.

2. The court below say, "every public officer, who neglects or refuses to perform a mere ministerial duty, whereby an individual is injured, is legally responsible to that individual, in some form or other; and a *mandamus* is one of the mildest forms of action that can be used;" making the liability to action, which should of itself prohibit the power of *mandamus*, the test of its correctness. They say "every public officer," including the president. Mr. Lee, in *Marbury* v. *Madison*, 1 Cranch 149, says not: though the court, in that case, say, "it does not depend on the office, but the nature of the offence. As to the president, see Judge Story's Constitutional Law, 3d vol. 419, where it is stated, that he is amenable to no civil process, to an officer of any department, to the speaker of the house of representatives, should he refuse to sign a law. The court asserts its right to interfere with all those officers, as to their acts of "mere ministerial duty." Now, the remedy by *mandamus* is just as applicable to their acts *of discretionary duty. So it appears, in all the books on the subject of *mandamus*. So, in 19 Johns. 259; so, this court, 9 Pet. 604. [*539

When a court has the power to order a *mandamus*, is goes, by its supervising authority, to an inferior; and goes, and ought to go, as well to enforce the discharge of discretionary duties as ministerial duties; with this only difference, that the command goes, in the one case, to do the prescribed ministerial act; and in the other, to proceed and exercise the discretion, and do the act in the way that discretion may direct it. So that a *mandamus* is as applicable to discretionary, as to ministerial acts; and in this case, if any *mandamus* could issue, it should have been, not to enter the particular credit required, but such credit as the postmaster-general should consider the award of the solicitor authorized; for this would not be a mere ministerial act, but one requiring the exercise of discretion. It is the same as giving judgment on an award, which surely requires discretion. 9 Pet. 603–4; 5 Binn. 104, 107.

Further, the principle of the court, sanctioning this interference with the officers of other departments, "whenever individual rights are concerned," is official action, in which the public, as well as the individual, are concerned. It was not so considered in *Marbury* v. *Madison*. That case only meant to allow it, where there was no public, but only an individual, interest concerned. The postmaster-general was to execute a law of congress affecting individuals, and also affecting the public. That execution first required of him to examine the solicitor's award, and the act of congress, and see if it was "so" awarded; that is, according to the terms of the law. Then, whatever was *so* awarded, he was to credit in his department, officially, so as to bind the government.

They were, therefore, executive acts: and it is admitted, in the court's opinion, "that the president was bound to see when he performed this act, and that he did it faithfully." But the court holds, that this power of the president gives him no other control over the officer than to see that he acts honestly, with proper motives; without any power to construe the law, and see that the executive action conforms to it; that is, the president is only to see to that which he can never see, at least, with certainty, the motives of his subordinate; and is not to see to the conformity of the executive

action to the law prescribing it ; which is the very thing he should see, and
*540] can *see, and for which he is responsible. This is quite inconsistent with every opinion of every writer upon this subject ; as in letters of Pacificus, 556–7, 559 ; Wilson 404 ; Chief Justise Marshall's argument on the case of Jonathan Robins, 5 Wheat. app'x, 16 ; Judge Story, 3 Com. 414.

Not only is it the president's duty to see how the laws are executed ; he is invested with discretion as to when they are to be executed. All the laws of congress are to be executed ; but not at one and the same time. Some depend on others. Some must be postponed, and some executed with despatch. Various circumstances may occur to delay the execution of a law ; circumstances which the executive department alone can know. This is stated in Judge JOHNSON's opinion in the *Cherokee Case*, 5 Pet. 1 ; and by the court, in 1 Wheat. 1.

Now, the circuit court assumes to direct and control all executive officers in all these respects. It, therefore, assumes the power described, as "the power to direct and compel, by *mandamus*, the official action of every public officer, wherein individual rights are concerned ;" and that, where the president is admitted, in regard to such official action of the officer, to be bound by his constitutional duty, to see that the officer does it faithfully, and to determine when he shall do it.

The attorney-general has denied, in his opinion, that such a power can be given to the courts. That denial we now maintain. It cannot be given to the courts, because it necessarily interferes with the power of control given by the constitution to the president. "Whenever a controlling power or power of appeal is exclusively lodged in any person or corporation, the court will not grant a *mandamus*. This is the case of visitors of colleges, or others of spiritual foundation. *Rex* v. *Bishop of Chester*, 1 Wils. 206 ; *Rex* v. *Bishop of Ely*, 2 T. R. 290.

It is impossible here to question the controlling power of the president over the postmaster-general, as to the duty to which he is to be compelled by this proceeding. Here is an act of congress, relating to the public money, and requiring the postmaster-general officially to do a certain act in relation to it. As to this act, the president is bound to have it executed. And the president, on whom this responsibility is cast, is armed by the constitution with full powers to enable him to have it fully and faithfully executed.
*541] *For if the postmaster-general will not execute it as the president thinks it ought to be executed, and the president acquiesces in this imperfect execution of it, then he violates his duty in having the laws executed. If the postmaster-general should think that he is the judge, and that he ought not to execute it as the president thinks it ought to be executed, he should resign ; or the president should remove him, and appoint another who will execute it. The president, therefore, on whom the responsibility of seeing the laws faithfully executed plainly rests, has, under the constitution, full power to fulfil the duty cast upon him, and control the postmaster-general in the execution of this act of congress. Therefore, according to the principle above referred to, the court cannot interfere by *mandamus*.

Further, the nature of this control, and the consequences of affirming the power of the court thus to interfere with it, will show the unreasonableness of the doctrine. What becomes of the president's responsibility to have

the laws of congress faithfully executed? Here is a law to be executed. The president is about to have it done, as congress meant it should be done; but the circuit court of the district of Columbia interpose, and command, by *mandamus*, that it shall be done otherwise. He is impeached for not doing it; or for doing it wrong. Can he defend himself by showing the mandate of the court? And if the control is with the court, ought they not to be responsible for the execution of the laws? And are they? And shall that power, which is charged with the duty of executing the laws of congress, be irresponsible?

Again, it has been shown, that the constitution casts this duty on the president; makes him responsible, and arms him with powers to fulfil it. Not so, in either respect, as to the court. If they assume the duty, it is by inference, from their power to try cases in law and equity. No responsibility is pretended; for, no matter how wrong they may decide, there is no responsibility for mistakes of judgment. And they are armed with no powers to carry out what they may command; it is *brutum fulmen*. Suppose, a peremptory *mandamus* to be the result in this case; it goes against Amos Kendall, postmaster-general of the United States. He refuses obedience; they send an attachment for contempt. It goes against Amos Kendall (as before), postmaster-general of the *United States; he is brought [*542
before them, and committed. If, then, the postmaster-general of the United States is in jail, is he still postmaster-general? Or is his office vacant, and must the president appoint another? Certainly, if the controlling power is with the court, this is what should be done; they would thus have the power of removal. And they also ought to have the power of appointment; for if they have the controlling power, they might get (in the same way they get that), by inference, all power necessary to make the controlling power effectual, so as to appoint such a successor as would carry their commands into effect, in opposition to that of the president. If the court cannot do this, they would then see that they had undertaken to command what they had no legal power to enforce. Is it not more wise and dignified, for a court to decline giving a command, which they see no law has given them the necessary power to enforce; and wait till they are invested with all the power necessary to attain the end in view? Must not every court decline a jurisdiction which the laws have not given them power to enforce?

If it be said, that the president would be wrong and arbitrary in thus resisting the court; the plaintiff says, that would depend upon ascertaining where was the first wrong. If the court usurped power, ought not the president to use his constitutional power to resist it? The late Chief Justice MARSHALL, in the case of Jonathan Robins, 5 Wheat. app'x, 16, says, that in such a case, it is the duty of the President to resist; so says General Hamilton, in Pacificus; and Judge WASHINGTON, as to the district court, in 2 Wheaton.

It may further be supposed, that the postmaster-general, on receiving the peremptory *mandamus*, takes another course. The command is to enter the credit to the relators for the amount awarded. Suppose, he enters it, in his own handwriting, as done by him, not in virtue of his office as postmaster-general of the United States, but as done by command of the circuit court, and so returns to the writ? Would the court hold this a performance? And then, what effect would be given to the entry in the post-office?

Would they pay a credit appearing to be allowed only on the authority of the circuit court? And if the paying officer refuses to pay, would the court enforce the payment? Here, as to this matter of enforcing payment, whatever the compliance may be with the present command, the court say they are in doubt. Well may they doubt a power to take the public money
*543] *out of the treasury, and make the United States suable in this case of law or equity. But they doubt; and ought not the doubt, whether they could arrive at the end, stop their setting out? What purpose is to be answered, by having an entry made in a book, if it may remain there as a dead letter? If it is to be read and treated as an entry made by an authority which is disputed; and which cannot be enforced?

The circuit court denied all this right of control in the president. If he sees the inferior executive officers acting honestly, he can look no further. How, or when, they execute a law, are things he has no concern with. It is impossible to sustain this position. The post-office, as established by congress, is an executive department of the government. The law of congress is conclusive as to this; for it gives him powers which could not be given, according to the constitution, if he were not the head of an executive department. As the head of a department, that officer is, therefore, subject to the power of the president; "to call upon him for his opinion in writing, upon any matter appertaining to the duties of his office." This implies, plainly, that he is, as to these duties of his office, subject to the president's control. For why should he give any account of his opinions upon matters appertaining to those duties, if he is independent of the president? And why should the president have the power of requiring such opinions as to his duties, but to ascertain how he means to execute these duties; and to enable him, if he finds he is about to execute a law, or discharge any of his official duties improperly, to direct and control, and, if necessary, remove him from office?

And this is declared against, as arbitrary power. It seemed to him directly the contrary. The president appoints these officers, and can remove them at pleasure; this all admit. He administers the affairs of government through them; and the presumption is, that they will execute the laws and the duties of their respective departments, in the manner he approves. Now, who does not see, that if he can have his will thus done by his subordinates, and escape all censure and responsibility for what is done wrong, by saying it was done by them, and that they were independent of his control; his power would be far more arbitrary, and more dangerous, than if they were made subject to his control, and he responsible for their acts. The framers of our constitution were wise enough to see this, and they have
*544] left him no ground for such an excuse; and the people *have always held him to this responsibility; and the opponents of every administration have always charged the chief magistrate, as openly and distinctly, with the alleged wrongs of his subordinates, as if their acts were truly his; and the supporters of no administration have ever pretended to defend the president from any of the alleged errors of his administration, on the ground that they were not his acts, but the acts of independent surbordinates. And so long as the government shall last, this is the true constitutional ground, and the only safe one on which those who administer it, must stand: and

were it not so, we should have the English maxim, that the king can do no wrong, made applicable to the president.

If the act in question affects the political powers of the president, as given by the constitution, the opinion in the case so much relied on, of *Marbury* v. *Madison*, is conclusive as to this control; and against the power of congress to take it from the president, and confer it elsewhere. One of the political powers or duties of the president, as given by the constitution, is, to see that the laws are faithfully executed; and both the late chief justice, in the case of Jonathan Robins, and Mr. Hamilton, in the passage referred to, in the letters of Pacificus, say, that he must ascertain what the law means; "must judge of it for himself." The opinion in *Marbury* v. *Madison* shows that there may be laws, in the execution of which the public is not directly interested, where only individual rights are concerned. And such is the case mentioned of an individual's right to a copy of a paper, on paying for it, and the other similar cases given in illustration of the principle. There are cases in which individual interests alone are concerned, and therefore, affect not the political powers of the president. But all laws which affect the public, are political; and the execution of those laws, their faithful execution, as he thinks they ought to be executed, the president must see to. And such are all the cases given in that opinion, as illustrations of executive acts, wherein the control belongs to the president. If it be said, as it has been in the court below, that this is an act which affects only individual interests; we say, the credit required to be entered in the relators' account, which account must be stated as having the credit, makes a sum of money due to them, which must be paid out of the treasury; and therefore, the execution of this act affects the public interest.

There are many reasons why such a control ought to belong to the exe, cutive, and not to the courts. And first, the power ought to be *left with the executive, because, from the organization of the government, [*545 it has always exercised it. It has length of time, continued possession, and long and uniform usage to plead for it. This command, if it issues from the court, is the first instance of such interference. The same lapse of time and continued usage that gives this claim to the executive, should bar the judiciary. It seems hardly possible to conceive, how any court should possess such a jurisdiction for near forty years, and never be called on to exercise it till now. How has it happened, that all the claimants in such cases, and all the lawyers and courts of the United States should be ignorant of it? It cannot be said, no such case has occurred, for every claim made upon the government, and disallowed by the executive officers, might have been brought before the courts, as is the present one. In the next place the executive ought to have this power, because it is executive in its nature. The executive is fitted to execute it, and armed with means to execute it. It can always execute it (as executive power always ought to be executed) promptly, uniformly, and in the time and manner that the public interests may require; and as its means may enable it. The contrary of all this is the case with the courts. They are unfitted to wield this power, because they have not the information of the state of the executive department; its duties; the means within its control; and the various circumstances which may obstruct and delay executive action. And they cannot get this information; for even if they had a right to call for it, they have not the time,

unless they neglect their ordinary judicial business, to acquire this knowledge of executive affairs. Then, the executive, when it has the necessary means, and it is desirable to do so, can act promptly. But the courts are trying "a case in law or equity," and that is a business which is never done very promptly. Judicial robes are not the garments for quick action. When the judgment or decree comes, it seems to be conceded, there is an appeal to this court, at the application of either the claimant or the officer. Is this appeal to suspend the execution of the law, or the act of executive duty required? If not, what is the worth of the proceeding? and if it is, what may not be the consequences of the delay?

Again, the executive acts uniformly throughout the Union; if that department directs the action, all executive acts will be performed alike; all the laws will be executed in the same way. But if the courts assume the
*546] power, they may (as they often do) *differ with each other. A law may be directed by the court in one state, to be executed in one way; and by the court in another state, in another manner. It is true, their differences may be settled by appeal to the supreme court; but could a government be endured, all whose laws, or whose executive action, at the claim of any individual who may conceive his interests affected, were liable to be suspended, till their judicial differences were investigated and decided.

And further, if the inferior executive officers are subjected to this double control, viz., that of the president and of the courts, how are they to serve these two masters? And if their commands differ, which is to prevail? The case of *Marbury* v. *Madison* shows there can be no such thing as this double control. It distinctly states, that the act of duty sought to be commanded by the *mandamus* in that case, was one in relation to which the president had no control over the officer; and it as distinctly admits, that where the officer is, in relation to the duty sought to be enforced, at all subject to the control or direction of the president, there the court has no power to command him. In *Gibbons* v. *Ogden*, 9 Wheat. 209, the supreme court says: "It seems, that a power to regulate implies in its nature full power over the thing to be regulated, and excludes necessarily the action of all others that would perform the same operation in the same thing." Now, if the power to regulate is thus necessarily exclusive of all other regulating power, *à fortiori*, a power to execute must be exclusive of all other executive power. Let it be supposed, that the act of congress now in question provided, in the very words of the constitution, "that the president should see that this law was faithfully executed by the postmaster-general." Would not this provision have given the control to the president? And could the court, in that case have interfered? And is not the provision in the constitution as effectual as it would have been in the act?

The power in question cannot be given to the courts, because, from the nature of the power, being the execution of a law which concerns the nation, it is political power (5 Pet. 20, 30); and belongs to the executive department; has always been exercised by it, and never by the courts; is fit for the executive, and unfit for the courts; being, therefore, executive power, belongs to that department. The executive power is vested in the presi-
*547] dent, and cannot *be vested elsewhere. *Martin* v. *Hunter*, 1 Wheat. 304, 316, 320; 3 Story's Com. 451, 340, 414.

Again, it cannot be given to the courts, because it is not judicial power.

What power can be given, according to the constitution, to the judiciary? Certainly, none but what is properly judicial power. Can the power of supervising executive officers, and directing them how and when they are to perform executive acts, be judicial power? There are two remarkable instances of the judiciary declining to exercise powers conferred upon them. One arose from the act of congress authorizing the circuit courts to report to the secretary of the treasury, the names of persons entitled to be placed on the pension rolls. The opinions of the judges are in 2 Dall. 409. They thought this was not properly of a judicial nature; and that, therefore, congress could not constitutionally confer it on the courts. There is certainly no comparison, as to the judicial nature of the two powers, between the examination into a claimant's right to a pension under the laws of the United States, and reporting its determination to the secretary of the treasury; and the power now in question. If this is properly of a judicial nature, it will be difficult to account for the nicety of the judges in declining the power given by the act referred to. The other instance is mentioned by Judge Story, in a note, in page 420, vol. 3, on Const. Law; and refers to 5 Marshall's Life of Washington, 433, 441. It there appears, that General Washington, as president, before he proceeded to the execution of the treaty with France of 1778, called upon the supreme court to expound it, and direct how it should be executed; and they declined doing so, on the ground that they could give no opinion, but judicially, in a case regularly brought before them. Now, if the judiciary has this supervising power over executive acts, and can direct the officers how they are to discharge them, on the application of any person interested; it is strange, that when the executive calls upon the court for is direction, it should be incompetent to give it. Can any reason be given, why an individual claiming the benefit of executive action from an officer should receive the aid of the court; and the officer, when he asks it, be refused?

Nor are we left to conjecture what is judicial power. The constitution *defines it. It says, "the judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties." &c. A great deal, no doubt, has been accomplished in the way of deriving powers from the constitution, in the way of construction; but the ingenuity that shall acquire for the courts, from the power to try cases in law and equity, the power to send any public officer to jail, unless he will discharge his executive duties in the way the courts shall prescribe to him, will very far exceed anything that has yet been attempted. It does not seem likely that the framers of this instrument were aware, that there could be a case in law or equity, that could be brought to so strange a conclusion; otherwise, some provision would probably have been made for supplying the place of the imprisoned officer. And as the officer, in such a case, whose disobedience, if it was conscientious, would not be guilty of an unpardonable offence, and ought not to be imprisoned for life; some limitation would, probably, have been attached to the period of his confinement. [*548

But the court thinks there should be little scruple in assuming this authority, and no objection in submitting to it. That, "as it can only be used in cases where a duty is to be performed, and where it is still in the power of the officer to perform it, the cases cannot be very numerous." With sub-

mission to the court, Mr. Kay said, he could not but think otherwise. Let it be once established, that whenever a public officer will not do what an individual, claiming under "a particular act of congress," or, "the general principles of law" (for to this extent, according to *Marbury* v. *Madison*, the doctrine goes), may require of him, this court may take cognisance of the case, and compel the officer to do the act; and the cases for such interference will be innumerable

What are most of the cases brought before the legislature, at every session of congress, but claims of this description? Claims arising for compensation for services rendered, or losses sustained; and claims under some "particular act of congress," or "the general principles of law," and which the officers of government have refused to allow. All the claims spoken of by Judge Story, in his Commentaries, p. 538–41, are of this description; and are spoken of as being without this or any other remedy: and have always, by all, been so considered. What is the present case, but a claim arising under a particular act *of congress? and was it not the same, before this particular act of congress of the last session was passed? Was it not originally a claim for services under a contract with the postmaster-general, under the post-office laws, a particular act of congress? When it was disallowed, might not the claimants have brought it here as well under one act as another? as well under the post-office law, without going to congress, and getting the special act under which they now claim, if they had only known of this supervising jurisdiction of the court they now invoke. And if this is a case now for the exercise of this jurisdiction by the circuit court, and was so, when the claimants carried it, in their ignorance, to congress; what claim can there be, affecting individual rights that arises under "an act of congress," or under "the general principles of law," where the public officers disallow it, or refuse or delay to act on it, that is not also such a case?

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The court speak, in their opinion, of this remedy by *mandamus* against public officers, commanding them how and when they are to perform their executive functions, as the "mildest" and the "best" form of proceeding; and think, that "the officers will be less harassed by it, than by the usual forms of action," for injuries to individuals. It would certainly be not only the mildest, and the best, and the least harassing to the officers, but quite agreeable, provided they should think it their duty not to do their duty, but to let the court do it for them, and obey their commands; but if they should think it their duty to act and think for themselves, and that the court had no right to think and act for them, and that what the court commanded was contrary to their duty, and should do their duty, and not the command of the court, then it would not be so agreeable a remedy; unless they should think retirement in a prison, during the pleasure of the court, more agreeable than the cares of office. He would beg leave to ask the court to compare what is thus said, with what was said here in the case of *Mc Clung* v. *Silliman*, 6 Wheat. 605. This court thinks exactly otherwise of this remedy; as being (even if the laws allowed it) the worst and the most harassing, and, in every way, the most improper. And whatever the officers might think of a remedy that seems so pleasant to the court, the public might not find it agreeable, to be paying officers their salaries for attending to their business,

while they were enjoying this "*otium cum dignitate*," under the sentence of a court.

*The circuit court relies on passages extracted from *Marbury* v. *Madison* as a refutation of the attorney-general's opinion, denying [*550 the power of congress to give the power claimed in this instance to the courts; and these *dicta* are assumed as settled decisions, and also as their chief, if not sole, authority for assuming the power. That there are some expressions in that case, that seem to favor some of the positions taken by the circuit court, may be admitted. That they sanction their assumption of the jurisdiction, we deny. How far are they examinable? Are they authoritative decisions? We respectfully say, not! If not touching the point in controversy, nor necessary for its decision, they may be examined. And this court has decided, that there are such expressions in that case. Attorney-General's Opinions 29; *Cohens* v. *Virginia*, 6 Wheat. 399–400. What was the point to be decided? The constitutionality of the law of congress was the first question; and the point of jurisdiction thus arising being settled against the jurisdiction—all else is *dictum* and extra-judicial; everything else then is examinable. In *Cohens* v. *Virginia*, 6 Wheat. 399–400, it is admitted, that there are *dicta* in that case, and one of them, very near to the point decided, is overruled. In *Wheelwright* v. *Columbia Ins. Co.*, 7 Wheat. 534, another is rejected. Another, at the close of page 167, 1 Cranch, is directly opposed by the argument in *Jonathan Robins's Case*, in page 16 of App'x to 5 Wheaton; and not reconcilable with 9 Wheat. 819, and 6 Pet. 465; and another (that which states the remedy by action as making a *mandamus* improper) is directly repudiated by the circuit court in their opinion in this case. *Marbury* v. *Madison*, therefore, settles no other question than that which arose as to the jurisdiction. And the whole course of the court, and its settled and repeatedly declared doctrine is, that any opinions given on the merits of a case, where a question as to jurisdiction arises (unless where the jurisdiction is affirmed), are not only *dicta*, but extra-judicial. The following cases will show the strongest expressions of the court against entering upon any question, until that of jurisdiction is so decided as to make their consideration necessary to the determination of the cause. 2 Dall. 414; 5 Marshall's Life of Washington 443; *United States* v. *Moore*, 3 Cranch 172; *Bradley* v. *Taylor*, 5 Ibid. 221; *Wilson* v. *Mason*, 1 Ibid. 91; *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Cherokee Nation* *v. *Georgia*, 5 Pet. 15, 21, 31, 51; *Ex parte Crane*, [*551 Ibid. 200. If the case of *Marbury* v. *Madison* had been regarded by the circuit court as authoritative throughout, it would have supported the attorney-general's opinion. The act sought to be enforced in *Marbury* v. *Madison* is plainly distinguished from the one now in question. There, all executive action had ceased, nothing official was to be done; and Mr. Madison was merely the holder of a paper to which the relator was entitled by his appointment, whether he received the commission or not. He was appointed by the signing and sealing of the commission. "No other solemnity (say the court) is required by law; no other act is to be performed or done, on the part of the government. All that the executive can do to invest the person with his office, is done." So that whether he got the commission or nor, he had the office, without it. There was a case, then, in which, as the court understood it (and whether correctly or not, is immaterial), there was

no executive act to be done. "It respected a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents." It is an act on which "individual rights, depend." This is the description of the nature of the act which the court say may be thus enforced. Certainly, nothing like this can be said of the act now sought to be enforced here.

But this is not all. The court contrasts with this act they have thus described as fit to be enforced by *mandamus*, other acts, in relation to which, it admits there can be no such proceeding. What are they? They will be found a perfect description of the act now sought to be enforced. The court say (p. 166), "By the constitution of the United States, the president is invested with certain important political powers, &c.; to aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts," &c. Here is a fair description of the act now sought to be enforced by the postmaster-general. Among the important political powers vested in the president, one of the most important is to see that the laws be faithfully executed; and consequently, this law that the postmaster-general is now to be made to execute. That officer has been appointed by the president, to aid him in his duty of having the laws faithfully executed, by executing those that belong to his department. His
*552] acts are, therefore, the president's acts. And *this act (unlike the act to be enforced in *Marbury* v. *Madison*, is one which falls within the political powers invested in the president. Again, it is said of these acts which cannot be enforced, that "the subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive." (p. 166.) Now, the execution of a law of congress, in which the public is interested, is political; it respects the nation, not individual rights solely.

Here is a strong mark of distinction between the act in this case, and the act to be enforced in *Marbury* v. *Madison*. In this case, an entry of a credit is to be made in the books of the nation against the nation. It, of course, respects the nation. In thatc ase, the act, the delivering of the commission, the officer being already appointed without it, and entitled to his office without it, did not respect the nation, but the individual only. That this is the meaning of the court; that, when they say, "they respect the nation, not individual rights," they mean not individual rights solely, is obvious from another passage in page 170. The court say, "that it may be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive. It is scarcely necessary for the court to disclaim all pretentions to such a jurisdiction. An extravagance so excessive and absurd, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals; not to inquire how the executive or executive officers perform duties in which they have a discretion." It seemed to him impossible, to avoid seeing the likeness between the acts described by the court, as those in which it could not interfere, and the act now sought to be enforced in this case; and the unlikeness between the acts described by the court as proper for the exercise of the power, and the act now in question, and sought to be enforced against the postmaster-general. If the liability to

impeachment is considered, it seems clear, that in relation to any laws respecting the public (though they may also respect individual rights), the president may be impeached for mal-execution. Could the courts then assume the direction of the execution of such a law, and the president be still so liable? Such cases would come here. And yet the chief justice would preside on the trial of the impeachment, who would have tried the question as to how the law should be executed here.

*A concluding remark as to this case may be made here, though applicable to the remaining question, as to whether congress has given [*553
the circuit court this jurisdiction. When was the jurisdiction, if ever, given? It is said, in 1801, before the case of *Marbury* v. *Madison*. The circuit court had the jurisdiction then, if it has it now; and this court was not unacquainted with its jurisdiction, nor were the learned and experienced counsel of Marbury. It is asked, why, when every question of law necessary for his success was settled by this court, was not the application made there, then? But is it possible to believe, that this court would then have discussed these questions, if it had believed the case could have been taken before the circuit court, so as, in effect, to have tried, for the circuit court, questions of which it could not itself take cognisance?

He thought, he had now shown that the power in question was executive power, not judicial; and that, by the constitution, it belonged to the president, and could not be given by congress to the courts. But if he had not succeeded in this, he thought he might, at least, insist, that, as it was a power hitherto exercised by the executive department, and not by the courts, and as he thought it must be admitted, to be more fit for the executive than the judiciary, it ought not to be assumed by the courts, as given by inference, by construing general words in an act, as having, in the court's opinion, that meaning. A clear, distinct, positive law, admitting of no reasonable doubt as to its meaning, ought to be the sole warrant for the exercise of such authority. He was sure, there was no such warrant here, no such clear plain grant of the power to the court; and for this he could appeal to the learned court below, and to the able and ingenious counsel for the relators; one, or the other, of whom, undoubtedly had failed to see it. For this case had been attended by this most remarkable circumstance: that the court were invited to assume this jurisdiction, by the relators' counsel, as appears in their printed argument (now before him), upon grounds, all of which the court considered to be insufficient; for they adopted none of them; and this could hardly have happened, where the power was clearly given. And the court then assumed the jurisdiction, upon a ground which did not appear to the opposite counsel as of any account; for their argument contains not a hint of it; and this, too, could hardly *have happened, [*554
where the power was clearly given. So that he had it in his power to say (what he never remembered to have had it in his power to say in any case before, and what seemed to him almost to supersede the necessity of saying anything else), that the grounds upon which the jurisdiction was claimed by the counsel, are insufficient, according to the opinion of the court; and the ground upon which it is assumed by the court, insufficient, according to the opinion of the counsel. Surely he might say, in such a state of things, that this was a power not clearly given by a law; and not even clearly gotten by construction.

In the printed argument for the relators, he observed, that the fifth section of the act establishing this court is not once referred to, as giving the jurisdiction in question; the third section is alone relied on, as referring to the act of 13th February 1801; considered, though repealed as to the other circuits, as being still in force here. The court, in its opinion, although this act of 13th February is recognised as unrepealed here, say not a word signifying their taking the jurisdiction under any of its provisions; but rely exclusively on the fifth section of the act establishing the court. Yet, he admitted, it was possible (though certainly in the highest degree improbable), that the true ground of the jurisdiction assumed, might have escaped all the researches of the counsel and of the court, in the first instance; and only be discovered finally, when all other grounds appeared unavailable. He would only say, that if this should prove to be successful, the relators were most fortunate litigants. They presented their claim to the remedy they sought, on one ground (the third section of the act of 27th February 1801, referring to the act of the 13th February 1801); and the court, having previously decided, in *United States* v. *Williams*, that they could not assume any jurisdiction on that ground, assume it on another (the fifth section, and appear to place their decision on the difference between the terms *case* and *suit*). This was being very fortunate. But this was not all. The ground on which the court assume it, viz., this difference between *case* and *suit*, is found to be opposed by the supreme court, in 2 Pet. 464; and Judge Story, 3 Com. 507. And then the relators' counsel light upon another ground for sustaining the jurisdiction assumed, viz., the words "concurrent with *the courts of
*555] the several states," which are found in the 11th section of the judiciary act; and are considered as limiting the jurisdiction of the other circuit courts, the absence of which words from the fifth section of the act of 27th February 1801, are held to invest the circuit court of this district with the jurisdiction in question.

He should not think this ground required any particular examination, were it not that it appeared now to be the only one on which this jurisdiction could be expected to stand. He should proceed, therefore, to examine both the third and fifth sections of the act of 27th February 1801, establishing the circuit court of this district; under one of which it is incumbent for the relators to show the jurisdiction they have invoked, to be given. It is settled by the cases of *McIntire* v. *Wood*, 7 Cranch 504, and *McClung* v. *Silliman*, 6 Wheat. 598, and 1 Paine 453, that this jurisdiction is not given to the other circuit courts, by the 11th section of the judiciary act. Therefore, it must be shown, that one or the other of these sections gives a broader jurisdiction to the circuit court of this district, than is given by the judiciary act to the other circuit courts.

1. As to the third section. This gives to the court and the judges thereof, here, the same powers then vested by law in the other circuit courts and the judges thereof; and the argument is, that as the act of 13th February 1801 (since repealed by the act of March 8th, 1802), was then in force, all the jurisdiction then vested by the act of 13th February 1801, was vested in this court: and that as the act of March 8th, 1802, only repealed the act of 13th February, and not the act of 27th February 1801, all the jurisdiction thus given by that act to this court, was unaffected by the repeal.

It admits of several answers: 1st. This section should be expounded,

according to the plain intent of congress, to give the court and its judges here the same powers with the other circuit courts, not at any particular time, but at all times. 2d. The act of 8th March 1802, not only repeals the act of 13th February 1801, but re-enacts the judiciary act of 1789; and that re-enactment repeals all laws inconsistent with the act of 1789, thus re-enacted; and consequently, all such parts of the act of 27th February 1801, as gave, by reference to the act of 13th February, powers differing from those given by the act of 1789.

*But if this act was unaffected by the act of 8th March 1802, the construction attempted to be given to this section, could not be sustained. We are referred by it to the act of 13th February 1801, for the powers of the courts. Must we not look for that section in it which relates to the powers of the courts? We find such an one, and it refers us again to the act of 1789. So that the powers then vested by the act of 27th February 1801, in this court, are the powers given by the act of 1789. And that act, it is conceded, has been settled, as giving neither power nor jurisdiction to issue a *mandamus* in such a case. When, then, we are sent to the act of 13th February for the powers of the court, and the judges, can we pass by the section that relates expressly to that subject, and go to the one that relates to the jurisdiction of the courts. If there was no section to be found in the act of 13th February, relating to powers, there might be some little excuse for saying that you might go to the section providing the jurisdiction; but as there is a distinct section giving powers, you can, by no rule of construction, go to any other. And it is a fallacy to say, powers and jurisdiction mean the same thing; for if they might have such a meaning elsewhere, they cannot here, in an act which contains a distinct section for each. In each of those acts, that of 1789, that of 13th February, and of the 27th February, there are distinct sections; one giving powers, and the other jurisdiction. And if, in this act, the third section, by giving powers, gave also jurisdiction, as pretended, why should the fifth section give jurisdiction over again? Such a construction strikes the latter section out of the law. And they do not mean the same thing; jurisdiction refers to the cases and persons over whom the court is to have cognisance; and powers, to the means given to exercise its jurisdiction. And this distinct and precise meaning is manifestly that in which the terms are used in all these acts. [*556

If such a construction could be sustained, and the circuit court in this district, by thus having the powers given by the act of 13th February, could be considered as thus having the jurisdiction given by that act, and that jurisdiction was as extensive as is contended, how are we to account for its never having been exercised? for its being discovered only now, that this court has a jurisdiction denied to all the other courts? No case has been brought here, of its exercise; though hundreds of cases like the present are now before congress, *which the claimants have never imagined they could bring before this or any other court. And no instance of the exercise of any jurisdiction, under this act of 13th February, can be shown in the circuit court. On the contrary, the circuit court, in December term 1833, in the case of the *United States* v. *Christiana Williams*, when this third section was brought before them, after argument, in a deliberate written opinion, as we show in Judge CRANCH's notes of the [*557

case, disclaimed, expressly, all jurisdiction under it; saying: "this court takes its powers under the third section, not its jurisdiction." (4 Cr. C. C. 372.) The court below, therefore, was right in rejecting this ground thus presented by the relators' counsel, for taking the jurisdiction; and in saying, as they do in their first opinion, after the first argument, "the court takes its powers by the third section, but its jurisdiction by the fifth."

2. It remains now to be seen, whether the court has been more fortunate in selecting the fifth section as their ground, and their only ground, for assuming the jurisdiction. Here, as it is admitted to be settled, that the 11th section of the judiciary act does not give this jurisdiction, it must be shown by our adversaries, that there is a difference between that section, and the fifth of the act of the 27th February, so that the jurisdiction denied by the one, is given by the other. Comparing these two sections, omitting all immaterial terms, we find, that by the 11th section of the judiciary act, the circuit courts of the United States are to take cognisance of all suits in law or in equity, "concurrent with the courts of the several states." And by the fifth section of the act of 27th February, the circuit court of this district is to take cognisance of all cases in law and equity. As it is now not questioned, but that by 2 Pet. 464, and 3 Story's Com. 507, it is settled, that there is no difference between the terms "case" and "suit;" the only remaining difference rests on the words, "concurrent with the courts of the several states," contained in one statute, and omitted in the other. And the jurisdiction is now assumed by the court below, on the force of these words alone.

This obliges the court to maintain these two propositions: 1. That these words limit the jurisdiction of the circuit courts to such suits, or cases in law or equity, as the courts of the several states then had cognisance of. *2. That the courts of the several states had no jurisdiction of cases
*558] in law or equity, arising under the constitution and laws of the United States; of which two propositions, the only difficulty is, to say, which is the most untenable. From them, however, they conclude, that the United States circuit courts have no jurisdiction in cases of law and equity, arising under the constitution and laws of the United States. And this, they think, must have been the ground upon which this court, in two cases referred to, have denied the jurisdiction of the circuit courts to issue a *mandamus* to an executive officer. He would undertake to deny both the premises from which this conclusion was dawn. That this court laid dawn no such premises, and drew no such conclusion, was obvious, from the cases referred to.

1. Did congress mean, by these words, to confine the jurisdiction of the United States circuit courts to such cases of law and equity, as the courts of the several states then had cognisance of? What is the language? They shall take cognisance of all cases, in law or equity, "concurrent with the courts of the several states." And this means, it is said, that they shall take cognisance, not of all cases in law or equity, but of such only as the courts of the several states then had cognisance. This was surely a strange mode of expressing such a meaning. The argument is, that as they were to take a jurisdiction, concurrent with the state courts, congress meant, they should only take what the state courts then had; and that the positive words, that they shall take cognisance of "all cases in law or equity," are to be con-

trolled by the inference arising from the others. But surely, the court should have construed the law so as to give more effect to the express words than to the inference; and say, they must take jurisdiction of "all cases in law or equity" (a jurisdiction which congress could give), by force of those express words; and the words "concurrent with the courts of the several states," are to operate to show that congress meant not to give the jurisdiction exclusively (as they could have done) of the state courts. It is clear, that if congress did not mean this, but intended, what the court below has supposed, it would have been easy to have said, instead of "all cases," &c., "such cases," &c., as those state courts had cognisance of. The judiciary act shows, in this and several other sections, that congress did intend to give some portions of jurisdiction to the United States courts, exclusively of state courts, and other portions *concurrently with the state courts; and the constitution has been always so construed, as to [*559 admit the power and the propriety of doing so by congress. This is the interpretation of that part of the constitution given by General Hamilton, in the 82d letter of the Federalist; and by this court also, in *Cohens* v. *Virginia*, 6 Wheat. 396–7, 419. Cited, *Bank* v. *Deveaux*, 5 Cranch 85; 3 Story's Com. 619–22; *Houston* v. *Moore*, 5 Wheat. 27–8; 3 Ibid. 221; 1 Kent 539, 96–7, 342–3, 319. The language, therefore, used by congress does not admit of such a construction.

And if the act could be construed with this restriction of the circuit courts to the jurisdiction of the state courts; it may be asked, does it mean all of them; and if not, which? For we all know, they greatly differed. This law, it is known, was reported by a committee of congress, composed of eminent professional men, many of whom had assisted in forming the constitution, and one of whom was from each state. They, therefore, well knew the great differences of jurisdiction with which the different states had invested their tribunals; and if the intention was, that the United States courts should have the same jurisdiction that was given to the courts of the states, where they were respectively held; then it would follow, that the federal courts would not have the same jurisdiction everywhere, but would differ with each other as the state courts did. Congress cannot be supposed to have meant that; and it is settled, that they did not so mean; that their jurisdictions everywhere are the same. *Livingston* v. *Story*, 9 Pet. 632, and the cases there cited; and Federalist, No. 82. The Federalist, No. 82, shows that all these courts have, in all the states, the same legal and equitable jurisdiction, without any reference to the varying jurisdictions of the state courts. The first proposition, then, that the United States courts took only the jurisdiction of the state courts, cannot be sustained.

Nor is the court below sustained in their second proposition, that the courts of the states have no jurisdiction of cases in law or equity, arising under the constitution and laws of the United States. It would be most strange, if it were so; for the constitution of the United States, art. 6, § 2, declares, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties, &c., shall be the supreme law of the land, and the *judges in every state shall be [*560 bound thereby, anything in the constitution or laws of any state to the contrary, notwithstanding." Now, if any state court having, by the laws of the state, jurisdiction over all cases of law and equity, should be

applied to, to take jurisdiction in a case of law or equity, arising under the constitution or a law of the United States, which is binding on them as their supreme law, on what possible ground could they decline the jurisdiction? A case in law or equity may undoubtedly arise, under this constitution, or a law of congress, or a treaty made in pursuance of its authority, as well as under any other law; and if so, all courts having jurisdiction in cases of law and equity, must entertain the case. When a case is said to arise under the constitution, or a law of the United States, is settled in *Cohens* v. *Virginia*, 6 Wheat. 378: and what are all the cases where the right of appeal is given by the judiciary act to this court from the state courts, but cases arising under the constitution and laws of the United States?

Not a word from the court, nor from any writer upon the constitution, or the jurisdiction of our courts, has been mentioned, as giving any countenance to this new construction. They appear never to have entertained an idea of this limitation upon the circuit courts. He would refer to the 15th chapter of Sergeant's Constitutional Law (2d edit.) 123; 3 Wheat. 221; 4 Ibid. 115; and the act of congress of 26th of May 1824, establishing the courts of Florida, which recognises the circuit courts as having, by the judiciary act, jurisdiction of cases arising under the constitution and laws of the United States. See *American Ins. Co.* v. *Canter*, 1 Pet. 511.

According to the two propositions maintained by the court below, it would follow, that cases in law and equity, arising under the laws and constitution of the United States, could not be tried anywhere: for the court say, the state courts could not try them, and the United States courts have only the same jurisdiction, that is, no jurisdiction, over such cases. Neither of these propositions, therefore, can be sustained. And if they could, still it would be necessary for the court below to show, that this claim of the relators was a "case in law or equity."

What is a case in law or equity? "If B.," says the court's opinion, "a resident of this district, is indebted to A., upon a promissory note, this court has jurisdiction of the case." He apprehended something more was necessary than a note's being *due between such parties, to constitute a *561] case at law or equity. This court, in *Osborn* v. *Bank of the United States*, 9 Wheat. 819, prescribe other requisites. "That power, the judiciary, is only capable of acting, where the subject is submitted to it by a party, who asserts his rights in the form prescribed by law; it then becomes 'a case:'" and Judge STORY, in his Commentaries, vol. 3, page 507, referring to this case, says, "It is clear, that the judicial department is authorized to exercise jurisdiction, &c., whenever any question shall assume such a form that the judicial power is capable of acting on it. When it has assumed such a form, it then becomes 'a case;' and then, and not till then, the judicial power attaches to it. In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings." See, 2 Pet. 449; 6 Ibid. 405; 5 Wheat. app'x, 16; 6 Binn. 5. So that before A. can make a case in law or equity out of the promissory note which B. owes him, he must submit it to the court, and assert his right, "in a form prescribed by law." And if he cannot find a law prescribing a form by which he is to assert his right, he cannot have a case in law or equity. No doubt, A. can find such a law, and therefore, he may have a case. But where do the relators find any law prescribing a form by which they may

require an executive officer to be compelled to discharge a duty devolved on him by law? If it be said, by a *mandamus*, under the 14th section of the judiciary law, as a writ necessary to enable the court to exercise its jurisdiction, it is answered by *McClung* v. *Silliman*.

Congress has not prescribed a form by which parties, who have rights to have official acts, in which they are interested, performed by the public officers on whom "the laws have devolved such duties, may turn these rights into cases at law or equity between them and the officers, and submit them as controversies to the courts. Judge STORY says (3 Com. 541): "Congress have never yet acted upon the subject, so as to give judicial redress for any non-fulfilment of contracts by the national government. Cases of the most cruel hardship and intolerable delay, have already occurred," &c. Again, "he is disposed to think that some mode ought to be provided, by which a pecuniary right against a state, or against the United States, might be ascertained, and established by the judicial sentence of some court; and when so ascertained and established, *the payment might be enforced from the national treasury by an absolute appropriation." Can it [*562 be possible, that the learned judge was mistaken in all these views? That these cases of hardship and delay need not have occurred? That adequate remedies in the courts, or, at least, in this circuit court, are to be found, where they will be recognised as cases in law or equity? That the inability to sue the government is to be obviated, by enforcing execution, without suit, against the officer, and calling this process of execution, a suit? The section of the judicary act which gave to this court the authority to issue writs of *mandamus*, shows that congress did not consider claims calling for that remedy, as cases in law or equity; and further shows, that congress meant to give that sort of jurisdiction only to this high tribunal, and not to the inferior courts.

Much is said in the opinion of the court below, as to the distinction between the ministerial and discretionary acts of the executive officers. He did not admit, that this was a true test of the jurisdiction by *mandamus*. In *Custiss* v. *Turnpike Co.*, 6 Cranch 235, the act to be done by the clerk was merely ministerial; and this court thought, that as there was no act giving the circuit court jurisdiction over the act, it had no power to control him. Why, if the court could not control its own clerk in a ministerial act, could it control, in a similar act, the head of another department? But can the act sought to be enforced be considered a merely ministerial act? If compared with the illustrations given in *Marbury* v. *Madison*, it would seem not. *Griffith* v. *Cochran*, 5 Binn. 87, decides, that where an officer has to examine a contract, and be guided by that and a law in reference to it (similar to which are the duties of the officer here), it cannot be held as a mere ministerial act; and is not to be enforced by a *mandamus*. The same case, as also Judge WINCHESTER'S opinion, in the American Law Journal, before referred to, shows, that if the act is to be followed by taking money out of the treasury, it cannot be enforced by *mandamus*. Judge TILGHMAN remarks, "we have no right to do that indirectly, by *mandamus*, which we have no power to do directly; and we might as well be called on to issue a *mandamus* to the state treasurer to pay debt which is claimed by an individual from the state." (p. 105.)

It has been said, that injunctions have been allowed by the circuit court,

addressed to the treasury officers. *This has only been done in cases where the funds enjoined (as in the claims under the French treaty) were not the public funds, but moneys held by the officers, in trust for the claimants. The circuit court has always putits right to interfere, exclusively on this ground; and the government, in the time of Mr. Gallatin, and ever since, has denied, as to the public money, any power of the judiciary so to interfere. An opinion of Mr. Wirt, when attorney-general, expressly denies such power to the courts. And the court below held, some years ago, the same opinion. In the case of *Vasse* v. *Comegys* (2 Cr. C. C. 565), they said, "the fund is in the treasury of the United States. Can this be said to be within the jurisdiction of this court? The officers of the United States, holding public money, as money of the United States, are not accountable to any body but the United States; and are not liable to a suit of an individual, on account of having such money in their hands." It does not seem easy to reconcile this with the jurisdiction now assumed.

There remains another objection to the *mandamus*. There was, by action against the officer, another specific remedy. 3 Burr. 1266; 1 T. R. 296; 2 Binn. 361; 2 Leigh 168; 2 Cow. 444; 1 Wend. 325. In *Marbury* v. *Madison*, the principle of these cases is recognised; and it is said, if an action of detinue would lie, the *mandamus* "would be improper." And this is again sanctioned by what is said in the conclusion of this court's opinion, in *McClung* v. *Silliman*. Yet the court below overruled all these cases; their own decision in *United States* v. *Bank of Alexandria*; and say, that the officer's being possibly unable to pay the damages that might be recovered in an action, prevents his liability to an action from being such a remedy as should forbid the *mandamus*. As there can be no action that is not subject to such a contingency; it follows, contrary to all these cases, that a *mandamus* is allowable, although the officer is also subject to an action.

If what has been said, should make it even only doubtful whether the court below has the jurisdiction, Judge IREDELL, in 2 Dall. 413, and Judge BALDWIN, in *Ex parte Crane*, 5 Pet. 223, would show, in very strong language, the impropriety and danger of assuming a jurisdiction which has slept ever since it was given, till the present occasion.

*564] *Coxe*, for the defendants in error.—The facts and history of this case, as disclosed in the record, are peculiar. The questions which it presents are of the highest interest, as well as importance. It involves a large amount of property, which the relators believe belongs to them, by as perfect a right as that by which any property can be held; and which has been unjustly and illegally withheld from their possession. It involves the examination of the proceedings of a high functionary, under the blighting influence of which, a vast amount of personal suffering has been endured; and which has already brought to a premature grave one of the parties on the record. It involves general questions as to the rights of the citizen, in his pecuniary transactions with the government, between whom and himself contract stipulations subsist. It involves a consideration of high and heretofore unknown powers, claimed as belonging to public officers, in withholding their action, in cases where specific duties are imposed on them by positive statute; and of immunities asserted in regard to them, when private rights

are violated, and the injunctions of the law disregarded. It involves a consideration of the extent of legislative power; and of the means by which that authority may be enforced. It involves the nature, character and extent of judicial power, under our institutions; and indeed, whether the judiciary be, or not, a co-ordinate and independent department of the government. It involves the true interpretation of some of the most important clauses in the constitution; the essential principles of all free governments, and especially of our own peculiar institutions.

Nor are these matters, thus forced upon our consideration, limited, either in their application to the individuals who are parties on this record, to the particular territory under whose local jurisdiction this case has arisen, or to the particular period in our history which is now passing. They embrace every citizen of this vast republic; thy are co-extensive with our geographical limits; they will retain all their interest, and all their importance, so long as our fabric of government shall live, and our constitution continue in existence.

A brief review of the history of this case is essential to a correct presentation of the proper subjects to be discussed. It originated in an illegal act of the present postmaster-general; who undertook to reverse the acts of his predecessor in office; to annul contracts which he had made; to withdraw credits he had given; to re-charge moneys which he had paid. This proceeding has been declared by *this court to be illegal, and beyond his [*565
authority. *United States* v. *Fillebrown*, 7 Pet. 46.

Congress, on the memorial of the relators, referred the adjustment of their claims to the solicitor of the treasury, and made the award of that functionary conclusive. He made his award; the postmaster general assumed the right to reverse the decision; and to set at definance the act of congress, which imposed upon him the plain duty of executing it. The attorney-general, called upon for his official opinion on the question in which the postmaster represented the solicitor as having misconstrued the act of congress, and thereby transcended his authority, concurred with the solicitor in his interpretation of the law; and his opinion is treated with worse than contempt. The judiciary committee of the senate, after full consideration; and the senate, by an unanimous vote; ratify and sanction the action of the solicitor; yet this insubordinate inferior still hangs out the flag of defiance. The judiciary interpose; their mandate is disregarded, and language highly menacing in its character employed, in the intelligible intimation, that their process may be stricken dead in the hands of the marshal, by dismissing him from office, for the simple reason, that he has performed, or is about to perform, his positive duty. Throughout, therefore, it appears, that this functionary has arrayed himself in an attitude of hostility against all the authorities of the government, with which he has been brought in contact; and the official interference by the district-attorney and the attorney-general in this proceeding, conveyed the first information that he was sustained in any part of his course by any official influence.

Another singular feature in the case is, that the allegations made by the relators are substantially admitted to be true. The validity of the original contracts under which the services were rendered, is not denied; the extent and value of those services, is not controverted; the construction of the act of congress, is not questioned; the obligation to pay the money, is not put

in issue. The postmaster-general concedes all these points; but plants himself on the single ground, that however clear may be our right, however just may be the debt, however precise the injunctions of the act of congress, the law cannot reach him; that the claimants still have no other remedy than such as he may graciously please to extend, or than may be found in the power of the executive to remove him from office. He insists, that notwithstanding the act of congress for their relief, and *the award made by the solicitor, the parties stand precisely as they did before they went to congress. Substantially, this court is asked, by the plaintiff in error, to expunge the act of congress from the statute book; and to treat the proceedings of the solicitor as a nullity. Independently of them, we had the same remedies which it is contended we now have; we might then have supplicated the postmaster-general to do us justice; we might then have invoked the power of the executive, to see that the law should be faithfully executed.

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The question is thus brought within a narrow scope. Is there any power in the judiciary of our contrary, to reach such a case of acknowledged wrong? and to enforce against this party the performance of an unquestionable duty?

In discussing this case, it will be attempted to maintain the following propositions; which will be found to comprehend everything essential to bring us to a correct conclusion: 1. That upon the general principles of the law, governing this particular form of proceeding, and in the absence of any objections derived from the provisions of the constitution or acts of congress, this is a proper case for a *mandamus*. 2. That the constitution does authorize congress to vest in the courts of the United States, power to command the officer to whom the writ was directed, to perform the act which he was required to perform. 3. That congress has, in fact, exercised this authority, by conferring on the circuit court of this district, power to award the *mandamus*, in the present case.

Before proceeding to discuss these propositions, it may not be irrelevant to remark, generally, that the return of the postmaster-general, in this case, is defective in all the essential requisites of a good plea. No one fact is averred, in such a form as to admit of being traversed, or to sustain an action for a false return. The return to a *mandamus* should be as precise in its averments as any form of plea, or even an indictment. 10 Wend. 25.

1. Is the remedy by *mandamus* the appropriate remedy in the present case? The relators have a clear, precise right, absolute and unconditional, secured by an act of congress; and this right is withheld by an officer especially charged by law with the performance of an act essential to that right. Is there any other specific, adequate, appropriate *legal remedy? If none, then, upon the principles which govern this form of proceeding, a *mandamus* will lie. It has been argued, that such other remedy exists: 1. By personal action against the delinquent officer. 2. By indictment, if he has violated the law. 3. By petition to the executive, whose business it is to see the laws faithfully executed; and who can exercise, in case of recusancy, his constitutioual function of dismissing the party from office. Neither of these furnishes such a remedy as the law regards. Neither of them puts the party in possession of the right which is withheld. If a civil suit be instituted, it must be a special action on the case, in which

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damages may be recovered to the extent of the injury actually sustained by withholding the right; but after the recovery, the right to the specific thing remains perfect and unimpaired. This right is not extinguished by such recovery; and so long as it is withheld, the party may continue to institute new suits, and recover fresh damages. In an indictment, the public wrong only is punished; the private injury is unnoticed; the fine goes into the public treasury; the imprisonment of the delinquent leaves the private right unaffected. 2 Binn. 275; 4 Barn. & Ald. 360; 6 Bing. 668; 10 Wend. 246.

We are, however, told, that the peculiarly appropriate remedy provided for the citizen, in such a case, is, to petition the executive to command the performance of the act; and if his command is disobeyed, to remove the insubordinate officer from his office. Is this, in the language or spirit of the law, a specific, adequate and appropriate legal remedy? A petition, which is addressed to the grace of the executive; which may be disregarded and put in the fire, at the pleasure of the functionary to whom it is addressed; which, if granted, will not secure redress for the wrong, but, at the utmost, only punish the wrongdoer! This doctrine, that an American citizen, whose rights have been violated by a public functionary; whose property is withheld, in opposition to the clear requisitions of a positive statute, has no remedy but by petition to the executive; is a monstrous heresy, slavish in the extreme. It has no ground of support in the language of the constitution, or the spirit of our institutions. The enunciation of such a doctrine in England, was made, more than a century since, the basis of one of the articles of impeachment exhibited against Lord Somers: 14th article of impeachment, 14 Howell's State Trials.

*These are not, however, the grounds upon which the plaintiff in error himself rests. He denies that the *mandamus* is the appropriate remedy: 1. Because he has a discretion under the law; and where the officer, has a discretion, no *mandamus* lies. 2. Because the writ can only issue in cases in which it is necessary; not as a means of obtaining jurisdiction over a case, but as a means of exercising a jurisdiction already vested. [*568

In any sense in which the doctrine advanced in the first objection can be made applicable to the case at bar, the position assumed is unfounded. In the general language in which it is expressed, it is denied. It does not follow, from the fact, that a discretion is vested in an officer, that therefore no *mandamus* will lie. If a statute empower an officer, or an individual, to do a particular act, but leaves it exclusively to his discretion to perform it or not, no *mandamus* will lie to compel its performance. If, however, he is directed to do an act, but has a discretion to perform it in either of two ways, a *mandamus* will lie to compel him to exercise his discretion; and having done that, to perform the duty in the mode which he had selected. If, for instance, the act of congress for the relief of the relators, had directed the postmaster-general to pay them the full amount awarded in gold or in silver, at his discretion; a *mandamus* would lie to compel him to determine in which metal he would pay; and having decided that, to enforce the actual payment. Such is the doctrine of all the cases. 5 Wend. 122, 144; 10 Ibid. 289; 13 Pick. 225; 3 Dall. 42; 1 Paine 453. In order to bring himself within the correct principle of the law upon this subject, the post-

master-general must show, that under the act of congress, he was authorized to give the credit claimed, or to withhold it, at his pleasure.

His argument is, that because he must examine the provisions of the law, and the award of the solicitor, and compare them together, to see whether the latter is within the power delegated by the former; he must exercise judgment, and consequently, possess a discretion. Because some preliminary examination may be necessay, in order to ascertain the precise duty which is enjoined; does the obligation to perform it, when ascertained, become less imperative? If, in order to know, distinctly, what is his duty, it be necessary to examine one statute or fifty, one section or many, the simple statute, or in connection with that, an award made under it, is wholly immaterial; *a sheriff has the same discretion in the service of all process, yet his act is purely ministerial, and he may be enforced to execute the writ placed in his hands.

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2. A *mandamus* can be issued only as a means of exercising a jurisdiction already vested; not for the purpose of obtaining jurisdiction. The argument upon this point is so singularly deficient in precision, that it is somewhat difficult to determine its exact scope. He says, the circuit court has not original jurisdiction to adjudicate upon claims of contracts upon his department. From this proposition, he deduces the inference, that all the jurisdiction which can be exercised, must be of an appellate character. Then, from the fact that the act of congress makes the award final and conclusive, with no power of revisal or reversal vested anywhere, he reaches the conclusion, that the court possesses no appellate jurisdiction.

The jurisdiction which has been exercised is not of that original kind which is thus denied to exist; for no action has been instituted against the department, for the purpose of adjusting the claims of the contractors; the existence and extent of those claims had been already determined by the special tribunal to which the power was confided. No attempt has been made, to subject that decision to the review of the circuit court, so as either to reverse or change it. The appellate power, therefore, which he denies, has never been claimed by or for the court; such high power has been claimed and exercised by himself alone. The circuit court assumes the conclusive character of the award; the object of this proceeding is to enforce, not to annul; to execute, not to reverse. The result then of this inquiry is, that the case is one in which the remedy by *mandamus* is the appropriate remedy, according to the general principles of law governing that writ. 1 Cranch 163, 167–9; 5 Bac. Abr. (new Lond. edit.) 261; 2 Brock. 11. Further illustration of this position will be found in the subsequent parts of the argument.

3. Unless, then, some constitutional objections, fatal to our claim, can be presented, or some deficiency in the provisions of the law to meet the case exist, the circuit court has not erred in awarding the *mandamus*. It is, however, objected, that under the constitution, no such power can be vested in the judiciary. This objection, as presented in the return, is, with characteristic modesty, put forth in the shape of a doubt. "It is doubted, whether, *under the constitution of the United States, it confers on the judiciary department of the government authority to control the executive department in the exercise of its functions, of whatever character." It appears to be assumed in the objection, as thus presented, that the

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jurisdiction claimed on behalf of the judiciary, is a power of control over the executive department. Much of the argument employed in this case has been directed against the mere figments of the imagination of this high functionary.

The mutual independence of the three great departments of the governments is assumed throughout our entire argument. That each is to act in the performance of its appropriate functions, uncontrolled by either of the others; that each possesses all the powers necessary to the full and complete exercise of its own authority; if denied in any part of this case, is denied only by the postmaster-general, and by his counsel. The language of the constitution in describing the extent of the judicial power is large and comprehensive. Art. 3, § 2. It comprehends all cases, in law or equity, arising under the constitution and laws of the United States. No limitation is expressed, no exception made, in favor of any description of case, any character of party, or any occupant of office. No individual is, in terms, exempted from this jurisdiction, in consequence either of the office he may hold, or the character of his act. The judicial power embraces all the cases enumerated in the 3d article of the constitution. 1 Bald. 545. A case affecting the postmaster-general, or the president, is still a case under the constitution. *Cohens* v. *Virginia*, 6 Wheat. 379.

It must be obvious, that the question immediately under discussion, involves rather an inquiry into the extent of legislative than of judicial authority. It is not what has congress designed to do; but, under the constitution, what may it do. The postmaster-general, and the department of which he is the head, are the creatures of legislative power. Art. 1, § 8, par. 7, of the constitution, confers upon congress the power to establish post-offices and post-roads. All the legislation of congress upon the subject is under this clause. All offices of the United States, except in cases where the constitution otherwise provides, must be established by congress. 2 Brock. 101. If congress may, then, create the office, prescribe the duties of the officer, determine what he may do, and prohibit him from doing *other [*571
things; may not the same power constitutionally declare to whom he shall be responsible, and confer authority, where it pleases, to enforce such responsibility?

Such has been the uniform action of congress, and its validity has never yet been questioned. The act of September 22d, 1789 (1 U. S. Stat. 70), § 1, which erected the department, provides, that the postmaster-general shall be subject to the direction of the president in performing the duties of his office. The act of February 2d, 1836, newly organizing the department, places the district attorneys, in relation to certain duties, under the control of the postmaster-general. By the act of February 20th, 1792 (1 U. S. Stat. 234), § 4, the postmaster-general is to render his accounts to the secretary of the treasury; and to this extent, is subject to the authority of that functionary. By the 24th section of the same act, he is made responsible for certain omissions, and certain moneys are recoverable from him. By the very terms of the law, he is made amenable to the jurisdiction of the courts. Are these provisions, one and all, unconstitutional? If not, how can the constitutional power of the same legislature to invest its courts with authority to direct the officer to act, as well as to punish him for not acting, be denied?

The argument of the postmaster-general, and of the attorney-general,

assumes, that the post-office department is an essential part of the executive department of the government; and from this position, infers the want of the jurisdiction claimed. The assumption has been shown to be inaccurate; but even if true, it is not easy to perceive the connection between the premises and the conclusion. We are referred to the debates in the convention, to show the anxiety of that body to preserve separate and distinct the three great departments. I will, in return, refer to the 47th and to the succeeding numbers of the Federalist, for a correct exposition of this maxim of political philosophy, and its practical adoption in our constitution.

Starting from this basis, the constitution is appealed to; and by the aid of some interpolation and some extravagant interpretation, we are told substantially, if not in terms: 1. That the clause in the constitution which provides that the executive power shall be vested in the president, actually confers upon him all that power which, in any age of the world, and under any form of government, has been vested in the chief executive functionary; whether king or czar, emperor or dictator. 2. That the clause which imposes
*572] upon the executive the duty of *seeing that the laws are faithfully executed, contains another large grant of power. 3. That, as a means to the performances of this duty, he is invested with the power of appointment to and removal from office. 4. That the power of appointment and removal carries with it the power to direct, instruct and control every officer over whom it may be exercised, as to the manner in which he shall perform the duties of his office. My observations upon these points shall be few and brief.

The first proposition was, perhaps, for the first time, distinctly advanced by General Hamilton, in his letters of Pacificus, No. 1, p. 535. A great and revered authority, but subject to occasional error. It was fully answered by Mr. Madison, in the Letters of Helvidius, p. 594, &c., and has since remained dormant. The second is now for the first time broadly asserted. Its dangerous tendencies—its hostility to every principle of our institutions, cannot be exaggerated. The true signification of this part of the constitution, I take to be simply this, that the president is authorized to employ those powers which are expressly intrusted to him, to execute those laws which he is empowered to administer; or, in the language of the late chief justice, he is at liberty to employ any means which the constitution and laws place under his control. 2 Brock. 101.

The third proposition is a palpable and unwarrantable interpolation of the constitution. The fourth, if the power claimed is derived from the power of appointment, would make the judges dependent upon executive dictation; if from that power, and that of removal, conjointly, would make it the true theory of the English constitution, that the king might instruct, direct and control the lord chancellor in the performance of his judicial duties; it would make him the keeper of the chancellor's conscience. The right to command, direct and control, involves the correlative duty of obedience. No officer can be criminally or civilly punished for obedience to the lawful command of a superior, which he is bound to obey. This doctrine, then, asserts the entire irresponsibility of all officers, except to this one superior. One of the practical inferences from these premises is, that the judiciary department cannot execute its own judgments; a proposition distinctly

avowed by the postmaster general in his return, p. 127–9, and asserted, in terms equally distinct, by the attorney-general, in p. 152.

*The attorney-general presses this argument still further, and, from the absolute inability of the courts to execute their judgment, [*573 in the case of a peremptory *mandamus,* "without the consent of the executive department," considers the inference as clear, that no court has the capacity "to issue such a writ." How obvious is the inference, if this be correct, that the courts can issue no process, and exercise no jurisdiction of any description. If this process, to use the expression of the postmaster-general, may be "struck dead" in the hands of the marshal, by dismissing him from office; may not very *capias* and summons, and *subpœna* and attachment? The law, however, has provided, that in case of removal from office the marshal may, nevertheless, proceed to execute the process then in his hands.

While adverting, in this argument, to questions rather of political than of legal science, it is somewhat surprising, that these learned gentlemen have overlooked one peculiarly important in the consideration of this subject. A maxim fully embodied in our institutions, recognised by every commentator on the constitution, whether judicial or political. This court has, upon more than one occasion, laid down the position, that the judicial power of every well organized government must be co-extensive with the legislative and executive authority. *Cohens* v. *Virginia*, 6 Wheat. 354, 382, 384; *Osborn* v. *Bank of United States*, 9 Wheat. 818. The true and sound constitutional doctrine upon this subject is, that whenever the legislature may constitutionally create an office, and prescribe its duties and its powers; they may make the incumbent responsible to the judiciary for the faithful performance of those duties. When the legislature may rightfully command an act to be done by a public officer, they may confer upon the judiciary the power to enforce its performance, or to punish its omission. In fact, the judicial power is never exercised, except for the purpose of giving effect to the will of the legislature. 9 Wheat. 866.

If, then, there be any limitation to, or any exception from, this general rule, or the comprehensive language of the constitution in conferring the judicial power, let it be shown in the instrument itself. Such is the doctrine of this court in *Cohens* v. *Virginia*, 6 Wheat. 378; and in *Rhode Island* v. *Massachusetts*, at this term (*post*, p. 657). If there be any exception embracing this party, excluding him from the jurisdiction of the court, let it be shown. If he is entitled to any exemption, let him exhibit his right.

*In examining the constitution for any such exemption, we are naturally led to that part of this instrument which defines and pre- [*574 scribes the extent of the judicial power, and to that which creates the executive department. In neither, can it be discovered. On the contrary, the constitution, at least, by powerful implication, recognises the executive officers as subject personally to the judicial power. So far as the ground upon which this exemption is claimed has been presented, it seems to be derived from the official character of the party called upon to perform the duty enjoined, and from the character of the act which he is required to execute. This is not, however, to be found in any provision of the constitution, no in the genius of our government. That executive officers, as such, are amenable to courts of justice for their official acts, would seem almost too

plain for argument. Such has ever been the law in England. In that country, exemption from legal process is confined exclusively to the monarch, and certain portions of the royal family. Yet, anciently, when writs were in general mandatory to the party, the king might be sued as a private party, the form being *Præcipe Henrico, Regi Angliæ.* 5 Bac. Abr. 571 (Gwil. Edit.), Prerog. E. 7; 43 Edw. III. 22. To the extent to which it existed in England at any time, it was a privilege, part of the royal prerogative, purely personal and incommunicable. Another branch of the same prerogative existed, under which the king granted writs of protection to such of his subjects as he might have occasion to employ in the public service, exempting them from arrest. Com. Dig. Prerog. D. 78–82. This was personal and temporary. With these exceptions, wholly inapplicable to the present times and to our institutions, no such principles as the postmaster-general invokes ever existed in England; and since the revolution in 1688, it is believed, no writ of of protection has been issued.

Frequently before, and uniformly since, that great event in English history, jurisdiction has been exercised by the various courts of England over the highest dignitaries of the realm, in relation to their official acts, through the instrumentality of such writs as were adapted to the particular cases that occurred, without distinction. Offices are forfeitable for malfeasance, and for nonfeasance; and this forfeiture enforced by a criminal prosecution. In 2 Salk. 625, will be found a short note of *Lord Bellamont's*
*575] *Case*, who was prosecuted *for an official act, as governor of the then province of New York. In *Mostyn* v. *Fabrigas*, Cowp. 161 (11 Harg. St. Tr. 162), Lord MANSFIELD held, that an action might be sustained by a native of Minorca, emphatically, as he says, against the governor of that island, for an act of official misconduct. In this country, such cases are numerous. *Gelston* v. *Hoyt* is familiar to this court. *Livingston* v. *Jefferson* was a case in which the defendant was sued for an act done by him as president of the United States. 1 Brock. 203. The recent cases of *Tracy* v. *Swartwout*, 10 Pet. 80, and *Elliott* v. *Swartwout*, Ibid. 137, are also cases of this description.

Such jurisdiction is, in terms, recognised by the constitution, in the clause relating to impeachment, and is distinctly admitted in various acts of congress. It is not necessary here to advert to more than one or two instances. The post-office act of 1792 has been already cited; but the act of February 4th, 1815 (3 U. S Stat. 195), in some of its provisions, recognises the amenability of the public officers of the United States, whether civil or military, to the judicial tribunals, even of the states, for their official acts. To a certain extent, this responsibility is conceded in the return on record. This concession is a virtual surrender of the entire case; unless the postmaster-general, while acknowledging his general responsibility, shall insist upon and sustain a special exemption from this particular process. He admits, that the court possesses the power to punish him if he does wrong, but denies that they can compel him to do right. A *capias* will lie, notwithstanding his high office; this power may be constitutionally vested in the courts. A *habeas corpus* will lie, if a citizen is wrongfully imprisoned by the highest dignitary; and an action be sustained for the illegal arrest. Damages may be recovered for an illegal act, or an injunction issue to restrain it. This particular remedy by injunction is given by express statute,

in certain cases in which the United States is a party (Act of May 15th, 1820, 3 U. S. Stat. 592); and its validity recognised by this court in *United States* v. *Nourse*, 6 Pet. 470; and impliedly in *Cathcart* v. *Robinson*, 5 Ibid. 264; in *Armstrong* v. *United States*, Pet. C. C. 46; 9 Wheat. 142–3, 145; 1 Bald. 214–15.

If all or either of these writs may issue, why not a *mandamus?* So far as authority goes, we have the legislative opinion on the question, in the judiciary act of 1789, expressly conferring this power upon this court; and the force of this authority is not weakened by the circumstance, that the unconstitutionality of that provision was *subsequently decided. [*576
Marbury v. *Madison*, 1 Cranch 137, contains the deliberate opinion of this court on the very point; and although the authority of that decision has been questioned by Mr. Jefferson, in his private correspondence; yet, before a legal tribunal, little weight can or ought to be attached to his opinion. The full authority of that case has been recognised by all the distinguished commentators; by Dane, Story and Kent; by this court, in *McIntire* v. *Wood*, 7 Cranch 504; *McClung* v. *Silliman*, 6 Wheat. 598; and in *Ex parte Crane*, 5 Pet. 190. In no one judicial decision; in the elementary treatise of no jurist; is the authority of that case upon this point impugned or questioned.

But the attorney-general supposes, that this process is applicable only to inferior magistrates; that it grows out of a general supervisory jurisdiction; and he finds no instance in England of its being directed to any officer of the executive department. The circuit court, in its opinion, while partially falling into the same error of fact, yet distinctly avoids the erroneous inference of the attorney-general. This is, however, a clear mistake; and it is matter of great and just surprise, that it should have been committed. It would not, however, be very material, if no direct precedent could be produced; for, to employ the language used in 10 Mod. 49, 54, if there be no precedent in which the writ has been issued in such a case, it is because no such case has ever before been presented to a judicial tribunal, and no precedent can be found in which it has been denied. But the precedent and authorities in favor of this, and analogous proceedings, are numerous, both in ancient and modern days.

Nevil's Case, Plowd. 382, was, in all its essential features, a *mandamus* to the officers of the exchequer, commanding them to pay a certain sum of money out of the royal treasure. *Wroth's Case*, Ibid. 458, was another case of the same character. The validity of such writ is expressly recognised in F. N. B. (Hale's edit.) 121, F. Writs of *mandamus* anciently lay to the escheator. 5 Bac. Abr. 258; Dyer 209, 248. The whole proceeding in enforcing payment of debts due by the sovereign to the subject, is exhibited in the *Bankers' Case*, 14 How. St. Tr. 1; which is one of the most remarkable and interesting cases, as well judicially as politically, to be found in English history. In *Vernon* v. *Blackerly*, Barnard. Ch. 377, 399, it was considered by the chancellor as the proper remedy. In *Rankin* v. *Huskisson*, in 1830, 4 Simons 13; and in *Ellis* v. *Lord Grey*, in 1833, 6 Ibid. 214; the analogous process of injunction was awarded *to the highest public [*577
functionaries in Great Britain, commanding them to do what the plaintiff in error contends no court can do. And in the *King* v. *Lords*

Commissioners of the Treasury, in 1835, the whole court of king's bench concurring, a *mandamus* was awarded to those high officers, commanding them to do what this party is required to do.

Is the American citizen less favored by law than a Brirish subject? Are the officers of this government clothed with loftier powers, and do they possess higher attributes, than those with which the prime minister of the British crown, and his immediate associates are invested. Is there anything in the character of our institutions which can create a difference? Such is not the doctrine in the great state of New York (10 Wend. 26), in the case of a *mandamus* to the canal commissioners, charged with the interest and management of the great works of internal improvement. In Pennsylvania, the same law prevails, 2 Watts 517; in Kentucky, *Craig* v. *Register of the Land-Office*, 1 Bibb 310; *Hardin* v. *Register*, *&c.*, 1 Litt. Sel. Cas. 28; *Commonwealth* v. *Clark*, 1 Bibb 531; *Divine* v. *Harvie*, 7 T. B. Monr. 443; in Ohio, *Ex parte Fenner*, 5 Ohio 542, and 6 Ibid. 447; and the only case cited in contravening our ground (1 Cooke 214), is a decisive authority to show that such also is the law of Tennessee.

But after the extensive and recent precedents set by this court, is it possible further to question the constitutional power of congress over this subject? What are the cases of *United States* v. *Arredondo*, 6 Pet. 763; *United States* v. *Huertas*, 9 Ibid. 172–3; *Mitchel* v. *United States*, Ibid. 762; *Soulard* v. *United States*, 10 Ibid. 105; *United States* v. *Seton*, Ibid. 311; *Mackey* v. *United States*, Ibid. 342; *United States* v. *Sibbald*, Ibid. 313? Each and every of these cases recognises the authority of the judiciary, under an act of congress, to issue its mandate to a ministerial officer, commanding the performance of a ministerial act.

3. The only remaining question for discussion is, has congress, in this particular instance, authorized the issuing of this writ, and exercised its constitutional power? To determine this question, reference must be had to the law organizing the circuit court of this district. The act of 27th February 1801 (2 U. S. Sat. 103), contains three sections bearing upon this point of inquiry. The first section provides, that the laws of the *state of *578] Maryland, as they now exist, shall be and continue in force, in that part of the said district which was ceded by that state to the United States, and by them accepted. The third section provides, that there shall be a court which shall be called the circuit court, &c. And the said court, and the judges thereof, shall have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States. The fifth section provides, that said court shall have cognisance of all cases in law or equity between parties, both or either of which shall be resident, or be found, within said district. The words of the clause conferring jurisdiction, will be found as comprehensive as those employed in the constitution; and if I have been successful in showing that congress may confer such authority, the fifth section shows that it has been, in fact, granted. There are no words of exception or limitation which can apply to the case at bar.

The attorney-general argues: 1. That the decisions of this court, in *McIntire* v. *Wood*, 7 Cranch 504, and in *McClung* v. *Silliman*, 6 Wheat. 598, show, that beyond the district of Columbia, the courts of the United States can exercise no such jurisdiction. 2. That the circuit court erred, in supposing that the provisions of the act of 27th February 1801, extend the

powers of the circuit court in this district beyond those of the other circuit courts. After quoting the language of the judiciary act of 1789, in relation to circuit courts in general, he institutes a comparison between that and the act of February 1801, and insists, that there exists no substantial difference between them; and that the inferences deduced from the language of this court, in *McIntire* v. *Wood*, are not only erroneous, but that they have been repudiated in *McClung* v. *Silliman*.

1st. The case of *McIntire* v. *Wood*, came before this court, on a certificate of a division of opinion, from the circuit court of Ohio; and it was decided, that the circuit court had no jurisdiction to issue a *mandamus* to the register of the land-office. That decision rested upon the provisions of the 11th section of the act of 1789, which was held not to confer the jurisdiction claimed; but the court expressly say, that had the section covered the whole ground of the constitution; in other words, vested all the power which the constitution authorized, the result would have been different. Aware that the language of that section was thus restrained, and that of the 27th February 1801, was unlimited, we regarded the case so triumphantly *cited against us, as an authority in our favor. In [*579
2 Wheat. 369, the same case, under another name, presented the question whether a state court could award the *mandamus* desired. In 6 Wheat. 598, it came again before this court, presenting both questions. On this occasion, the case of *McIntire* v. *Wood* was re-examined, and its doctrines re-affirmed; and the very question now at bar was adverted to in the opinion of the court, and our view of it sustained. This is again confirmed by the subsequent language of the court, where it is observed: "But when, in the case of *Marbury* v. *Madison*, and that of *McIntire* v. *Wood*, this court decided against the exercise of that power, the idea never presented itself to any one, that it was not within the scope of the judicial powers of the United States, although not vested by law in the courts of the general government."

2d. There is, in our judgment, a broad and essential difference between the provisions of the two statutes. The attorney-general brings the two enactments into juxtaposition, compares their phraseology, and treats the two laws after the fashion of an algebraic equation. The 11th section of the judiciary act of 1789 provides, that "the circuit courts shall have original cognisance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity," &c. The 5th section of the act of 27th February 1801 enacts, that "the said court shall have cognisance of all cases in law and equity," &c.

It may be remarked: 1. The subject-matter of the two laws is essentially different. The object of the first law was to organize and create courts, purely federal in their character, and therefore, limited both as to the subjects and parties over which they might take cognisance; the object of the other was to provide a tribunal to administer not only the laws of the United States, but the Maryland law, which was in terms retained, and without distinction as to the parties. 2. The act of 1789 was designed to comprehend all the courts of the Union, the supreme, the circuit and the district courts. The first was to be organized; but the extent of its jurisdiction, as conferred by the constitution, could neither be enlarged nor diminished. The other courts were to be organized, and between them was

to be apportioned and distributed such portion of the residue of the judicial
*580] power of the sovereign, as it pleased to vest in them respectively. *By the 14th section of this act, the power to issue a *mandamus*, in a case like the present, is, in terms, given to the supreme court. In interpreting the language, it is immaterial, that this was afterwards, in *Marbury* v. *Madison*, held to be unconstitutional. *Ex parte Crane*, 5 Pet. 298. The express grant to the one court, excludes the idea of an implied grant to another tribunal to exercise the same authority. 3. Another distinction is striking and important. The laws of Maryland are expressly continued in force; all the rights and remedies furnished and sanctioned by those laws are preserved. By those laws, a *mandamus* would lie to a public officer, commanding the performance of a ministerial duty. This is, to a certain extent, conceded by the attorney-general. This concession is a virtual recognition of an essential difference between the two courts.

In making this concession, however, he denies its application to officers of the United States, because no such writ could be addressed to them, under the laws of Maryland. This exception annihilates the admission, because all officers within this district, even the lowest officers of a corporation, derive their authority from acts of congress. The distinction attempted to be drawn is fallacious. If the courts of Maryland possessed the jurisdiction over an officer of that commonwealth, the transfer of sovereignty would not vest the same power in the courts of the district. If the power over the Maryland officers terminated by the cession, and that over officers deriving their existence from congress did not arise, the courts of the district do not succeed to the powers of the Maryland courts; nor do the citizens of the district preserve those rights, and retain the same remedies to which they were entitled before the cession.

The effect of a cession of sovereignty is misapprehended. The same laws are preserved, the same rights continued, and there exist the same remedies for enforcing them. The relations between the subject and the sovereign are the same; the parties between whom these relations subsist are different. This admits of various illustrations. An inhabitant of Florida, before the acquisition of that territory by the United States, owed allegiance to the king of Spain; he would have incurred the guilt and punishment of treason, had he borne arms under the United States against Spain. Since the cession, he owes the same allegiance to his new sovereign, and would
*581] incur the same penalty, were he to aid *Spain against the United States. The law is unchanged, but the parties are changed. So, take the history of the *mandamus*, as given by the attorney-general in his opinion. The colonial courts did not succeed to the jurisdiction over the same officers as the king's bench possessed, nor do the state courts. Our courts exercise a jurisdiction analogous to that of the king's bench, and issue a *mandamus* in analogous cases, to persons holding analogous relations. This is our argument.

3d. The 11th section of the judiciary act confers upon the circuit courts no other jurisdiction than such as may be exercised concurrently by the state courts. The design and policy of this provision, and the true meaning of this enactment may be found in 1 Kent 395, &c.; 3 Story on Const. 619, &c. As no jurisdiction was or could be conferred by congress on the state courts, the reference to them was merely to furnish a standard by which to measure

that of the circuit courts held within their territory. It is, then, a fatal objection to the jurisdiction of a circuit court, under the act of 1789, that a state court could not take cognisance of the case. That jurisdiction is still further limited, by being restricted to particular persons. No such limitations are found in the act of 1801. Upon this court is conferred general jurisdictions over all cases in law and equity. Until a special act of congress conferred the jurisdiction, the postmaster-general could not sue in the other circuit courts; they had no jurisdiction over cases arising under the patent laws or copyright laws, as such. But over all these cases the circuit court of this district always possessed and exercised jurisdiction. The circuit courts, under the act of 1789, could not entertain jurisdiction of cases, merely on account of their character or origin; they could not issue writs of *mandamus* or *quo warranto* to operate upon officers or courts of the Union, because over such cases the state courts had no concurrent jurisdiction. The circuit court of this district has, from its origin, exercised this jurisdiction.

4th. It is said, that in the circuit court a difference existed between the counsel and the court, as to the grounds upon which this jurisdiction was claimed. To a certain extent, there was some difference. Independently of the grounds that have been mentioned, I assert it as derivable from the 3d section of the act, which confers upon the court all the powers vested by law in the other circuit courts. The *only law then in existence, referring to them, was the act of 13th February 1801, which was afterwards [*582 repealed. It was intimated by the court, that it derived its powers from the 3d, and its jurisdiction from the 5th section. Strictly speaking, powers are not jurisdiction; the former are the means by which the latter is exercised. But in ordinary parlance, they are often employed indiscriminately; and in all cases, the one implies the other. Wherever jurisdiction is conferred, power to exercise it is implied; wherever power is granted, it is for the purpose of exercising jurisdiction. The word power is that which is alone employed in the constitution; and in the acts of 1789 and 1801, cognisance is used as an equipollent expression. It is not very important to which section we especially refer. If this be a case in law or equity, and either of the parties has been found here; it is a case over which the jurisdiction of the circuit court rightfully extends. If it be not "a case," what is it that is the subject of discussion? It is the claim of a legal right, pursued in court, by an appropriate legal process. Should any doubt exist as to the true construction of the act of 27th February, it should operate in favor of the jurisdiction; for if this court was right in *Martin* v. *Hunter*, 1 Wheat. 329-30, in asserting that it was an imperative duty in congress to vest in some tribunal or another, all the judicial power of the Union; no implication can be admitted, to exclude any class of cases, where the words of the statute are sufficiently comprehensive to embrace it.

Butler, Attorney-General, in reply:—It has been correctly said by the learned counsel for the defendants in error, that all the facts alleged in the petition are admitted in the return. On the relators' own showing, it was believed, that the *mandamus* could not legally be issued; the return, therefore, set up no traversable matter of fact; but merely stated objections, in point of law, to the relators' application. It was substantially a demurrer

to the petition. The authority and duty of the court to issue the writ, on the case stated by the relators, were, therefore, the only questions in the court below; they are the only questions here. They are purely questions of law; and they neither require nor authorize any investigation of the merits of the original controversy. And yet the learned counsel have felt themselves at liberty to indulge in reiterated and unsparing censures of the
*583] plaintiff in error; not *only irrelevant to the points to be decided, but founded on matters, in some cases not contained in the record, and in others, directly repugnant to it.

For example, the official action of the plaintiff in error in suspending the extra allowances made to the relators, by his predecessor, has been denounced as downright usurpation; illegal in itself, and cruelly oppressive; with how much justice, let the very words of the relators tell us. In their first petition to congress, after stating the extra allowances made to them, they go on to say, "that their account being unsettled in the books of the department, when the present postmaster-general came into office, he considered himself bound, in the adjustment of their accounts, to reject any credits for the allowances thus made to them, for this extra duty. In his construction of the post-office laws, he also felt himself without any legal authority to adjust the claims, and make any compensation for these services; and further, considering that there had been no legal sanction for the allowances thus made to your memorialists, he felt bound, by his duty, to stop the regular contract pay of your memorialists, till the sums they had thus received from the department (and which he considered as over-payments), were refunded to the government. Those views, thus entertained by the postmaster-general, of the post-office laws, and of the powers and duties of that department, were, at the request of your memorialists, submitted to the decision of the attorney-general of the United States. They refer to his opinion, accompanying this memorial, by which it appears, that he concurs in his view of these legal questions with the postmaster-general; so that no other remedy is left to your memorialists, in a case, as they conceive, of very peculiar hardship, except that which is intimated in a passage of the attorney-general's opinion, and expressed in reference to this and similar claims, in the conclusion of the postmaster-general's report to your honorable body." The remedy referred to was an appeal to congress, to whose favorable consideration the case was recommended by both those officers. The injustice of the complaint on this head is still further aggravated, by the fact, forming part of our public history, that the allowances in question, and others of the like nature, had been the subject of investigation by congress; and however ancient the practice, or innocent the motives, in which they originated, had been conceded, on all hands, to be wholly illegal.
*584] This entirely distinguished the case from that of **Fillebrown*, 7 Pet. 46, cited by the other side; where it was held by this court, that the secretary of the navy had legal power to make the allowances then in question. Under these circumstances, the accounts of the relators being unsettled, and the allowances not actually paid, the plaintiff in error might well think it his duty, to confine the credits of the relators to such items as were authorized by law; and to refer any claims not so authorized to the decision of congress. On the case stated by him to the attorney-general, his course was sustained by that officer; and the relators, in their application to con-

gress, did not attempt to question either the legality of his conduct, or the uprightness of his motives.

Equally groundless and repugnant to the record were the assertions, that the plaintiff in error had set at defiance the act of congress, and the authority of the solicitor; had treated with contempt the opinion of the attorney-general, on the construction of the law; or had ever given out the monstrous pretension, that the relators "have no other remedy than such as he may graciously please to extend, or that may be found in the power of the executive to remove him from office," &c. It appears by the record, that the suspended allowances amounted to $122,101.46, being for services prior to April 1835. The claim for these allowances, until after the act of congress, constituted the whole subject of controversy. When the subject came before the solicitor, the relators claimed a large additional sum ($40,625), for similar allowances, after April 1835, and until the end of December, in that year, the period when the contracts expired. It certainly was not strange, that the plaintiff in error should doubt as to the intention of congress to give the relators this additional sum. When has it before happened, that a party whose claims have been rejected by a department, has obtained from congress a law, covering not only the sum in dispute, but authorizing a claim for a large additional amount? Congress, however, have the power to pass such a law; and if they think that justice requires it, they should undoubtedly do so. This, the solicitor thought they had done, in the present case. On this point, he requested the opinion of the attorney-general; that officer concurred with him. He thought, with the solicitor, and still thinks, that the words employed in the act gave the solicitor authority to decide on claims on the contracts described in the law, for services *after as well as before April 1835. The plaintiff in error, who had [*585
not been consulted as to this reference, complained of the manner in which it was made; and also questioned the solicitor's right to call for the opinion. In this latter objection, he proved to be correct; the act of May 29th, 1830, which authorizes the solicitor of the treasury to ask the opinion of the attorney-general, referring exclusively to "suits, proceedings and prosecutions," under the care of the solicitor, by virtue of his general official duty. This did not occur either to the solicitor, when he made the reference, or to the attorney-general, when he answered it; but was afterwards admitted by both; and it certainly may well shield the plaintiff in error from one of the charges made against him, that of contemning the opinion of the law-officer. And besides, one of the main grounds on which he relied was, that, in truth, there was no contract in the case; and if he was right on this question of fact, then, neither the opinion nor the law sustained the award.

So far from setting congress at defiance, he expressly declares, in his letter to the president, of the 27th of December 1836, "that inasmuch as congress is now in session, the most appropriate resort is to that body, for an explanatory act, which, if it confirm the opinion of the solicitor, I will implicitly obey." Again, in his letter to the president, of the 31st of January 1837, after saying, that the balance cannot be paid, without further legislation; he adds, that "if congress thinks proper to require the payment, it will be his duty to make it." The same willingness promptly to obey the direction of congress, if by an explanatory act, or joint resolution, they should require the payment of the balance, is reiterated in the return to the

mandamus. It is true, that he has not deferred to the report of a committee of the senate, nor even to a resolution of that respectable body, as to a valid and mandatory law. Weaker, and perhaps wiser, men, would, probably, have yielded to an authority so imposing; but whatever may be thought of the prudence of his conduct, his firmness of purpose should command our respect; and with unprejudiced minds, will go far to evince the justice of his intentions. In calmer times, it may also be seen, that in insisting on the concurrence of both branches of the legislature, and especially of the house of representatives, as necessary to give a resolution touching the public treasure the force of law, he was really upholding a very important part of the constitution.

Other instances might be mentioned of the like, and even greater, injus-
*586] tice, *done by the other side to the plaintiff in error. All fair construction of his motives had been denied; he had been stigmatized as the relentless persecutor of unoffending and meritorious citizens; the death (not appearing on the record) of one of the relators, had even been imputed to him; and to all this had been added the still graver charge, of a desire to break down the judiciary establishment; to destroy the safeguards provided by the constitution; and to subject the legislative will to the control of the executive. In the argument just concluded, all the powers of a very brilliant vituperative eloquence had been put in requisition, to bring down upon his head the indignation and abhorrence, which, in a land of liberty and laws, are justly felt towards a functionary truly chargeable with delinquencies so enormous. That no part of this accusatory matter was really called for by the case, is obvious; that much of it wants even a shadow of support, has already been show; that any of it would be pressed upon this court, was not to have been expected. This hall had been regarded as holy ground; and the consoling reflection had been cherished, that within these walls, one spot had been preserved, where questions of constitutional law could be discussed, with calmness of mind, and liberality of temper; where the acts of a public servant might be subjected to free and rigorous scrutiny, without any unnecessary assault upon his character; where, though his conduct were proved to be erroneous, purity of motive might be conceded, till the contrary appeared; where it was usually deemed repugnant to good taste, to offer as argument, the outpourings of excited feeling, or the creations of an inflamed imagination; and where vehement invective and passionate appeals, even though facts existed, which in some other forum might justify their use, were regarded as sounds unmeet for the judicial ear. That an example so different from the course which might have been hoped for; an example so novel and unpropitious, should have been set, on the present occasion; was not less a subject of regret to him, than he was sure it would be to all who reverenced the dignity of this court, and who wished to perpetuate its usefulness and honor; and he confidently trusted, that the learned counsel themselves, when the effervescence of professional zeal and exciting debate had passed away, would participate in this feeling.

In replying to those parts of the opposing argument which belonged to the questions presented by the record, the attorney-general said, he would
*587] pursue an order somewhat different from that *adopted by the other side. He would, first, look at the parties before the court; and

secondly, at the particular proceeding which had been instituted, its nature and subject-matter, and the purpose desired to be accomplished by it. Under these two general heads, all the material points insisted on for the defendants in error, would be brought under review ; and the conclusion, he trusted, would be, that the court below had no jurisdiction to award the writ.

1. The court below had not jurisdiction of the parties. The idea of the court below, and which has also been insisted on here, that the United States are to be regarded as the plaintiffs, because the ancient form of the writ has been used, is palpably untenable. The real plaintiffs are the relators, who are residents of Maryland and Pennsylvania. The defendant was proceeded against, in his official capacity, as postmaster-general, for the purpose of compelling him to do an act exclusively official. The postmaster-general, as a public officer, is required to be a resident of the district of Columbia, and may be found within it ; but he is not so resident or found, within the meaning of the fifth section of the act of the 27th of February 1801. The words "between parties, both or either of which shall be resident, or shall be found, within the district," must be understood to mean, not parties, universally, but all parties capable of suing or being sued, who may be resident or found, &c. Foreign ministers, who are residents in the district, being incapable of being sued in the courts of the district, are clearly not within the words of the section. The postmaster-general, or other head of a department, is equally incapable of being sued, in his official character ; because there is no act of congress conferring such a capacity. Such an act is necessary to enable the postmaster-general to sue in his official character. *Osborn* v. *Bank of the United States*, 9 Wheat. 825, 855–6 ; *à fortiori*, is it necessary, to make him suable.

Again, the United States are the real parties defendants ; the object of the suit being to cancel balances in the treasury books, and to reach public moneys in the treasury. It cannot be said here, as in *Cohens* v. *State of Virginia*, 6 Wheat. 407–8, that the object is to get rid of a judgment recovered by the United States. The original object of the proceeding was to charge the United States. It is, therefore, in effect, a suit against them. Such a suit, independently of the general objection, that the government is not suable, except when it chooses to waive its immunity in this respect, could not be brought in the court below, for an additional reason. *The fifth section of the act of the 29th of February 1801, gives the [*588 court jurisdiction of all actions or suits, of a civil nature, "in which the United States shall be plaintiffs or complainants." This express, affirmative provision, necessarily excludes all cognisance of actions against the United States ; even if they were otherwise capable of being sued. It is no answer to the objections under this head, that they were waived by the appearance of the plaintiff in error, in the court below. That appearance was for the sole purpose of objecting to the jurisdiction ; and as no plea in abatement could be interposed, the want of jurisdiction was assigned in the return.

2. The court below had not jurisdiction of the subject-matter of the proceeding. The application was for a peremptory *mandamus* to the postmaster-general, in his official capacity. This officer, it is now admitted, is the head of one of the great executive departments. The court below has no jurisdiction to award such a writ to such an officer. This court has decided, that

the ordinary circuit courts have no such jurisdiction ; not, indeed, in express words, but by decisions which embrace that proposition, and much more. *McIntire* v. *Wood*, 7 Cranch 504 ; and *McClung* v. *Silliman*, 6 Wheat. 598, decide, that the ordinary circuit courts cannot issue a *mandamus*, as original process, even to a mere ministerial officer ; much less can they do so to an executive officer, the president, or the head of a department.

The circuit court of the district of Columbia, though it possesses much jurisdiction which the other courts have not, stands, in this respect, on the same ground. The words of the fifth section of the act of February 27th, 1801, so far as regards this question, are substantially the same as those of the 11th section of the judiciary act of September 1789, except that the latter includes the words "concurrent with the courts of the several states ;" which words are not in the act of 1801. These words, it is said, restrict the jurisdiction of the ordinary circuit courts to those cases over which the state courts had jurisdiction, in September 1789 ; and thereby exclude cases arising under the constitution, laws and treaties of the United States. And as the restriction is not contained in the district act of 1801, the argument is, that the jurisdiction of the circuit court of this district extends to all such cases, provided the parties be resident or found within the district. Several of the objections to this doctrine, made in the opening, have not been *589] answered by *the other side ; and it is, therefore, the less needful to pursue it. The reason for inserting this clause in the act of 1789, was to prevent the doubt which might otherwise have arisen, as to the right of the state courts to decide, in suitable cases, questions growing out of the constitution, treaties and laws of the United States. It was not inserted, either to give jurisdiction to the state courts, or to restrict the jurisdiction of the circuit courts ; but simply to exclude a conclusion. *Houston* v. *Moore*, 5 Wheat. 25–7. For that purpose, the clause was very proper in the act of 1789 ; but for any purpose, it would have been absurd in the act of 1801, for there are no state courts in this district ; and this, no doubt, was the sole cause of the omission.

In support of this view, it is further said, that the subject-matter of the two laws is essentially different ; the act of 1789 being designed to organize the courts of the United States, under the constitution alone ; and the act of 1801 to furnish such additional jurisdiction to the district courts, as was required by the local sovereignty exercised over the district. This change of circumstances undoubtedly demanded a much wider scope of judicial power ; but this was abundantly provided for, by adopting the laws of the states (§ 1) ; by extending the criminal jurisdiction of the circuit court to all crimes and offences committed within the district : and by enlarging the civil jurisdiction to all cases, in law and equity, between parties resident or found within the district ; instead of confining, as is done in § 11 of the act of 1789, the criminal jurisdiction, to offences against the laws of the United States, and the civil, to certain suits between citizens of different states, and other special cases.

The change of sovereignty did not require that the courts of this district should possess a power denied to all the other courts of the United States, to superintend and control United States' officers appointed for the whole nation ; nor can it be believed, that congress could really have intended to confer such a power. It is said, however, that they have actually given it,

by continuing in force the laws of Maryland; because, by those laws, a *mandamus* would lie to a public officer, commanding the performance of a ministerial duty, as well as in the case of corporations, &c. No doubt, by virtue of the adopted laws of Maryland and Virginia, and under its general jurisdiction, the circuit court of the district may rightfully issue the writ of *mandamus*, in all cases of the same nature with those in which it could have been issued by the Maryland and Virginia courts, to any *officer, tribunal or corporation within the district. In other words, for the [*590 purposes of this question, the Maryland side of the district is the state of Maryland; and the circuit court of the district now holds the supervisory power of the Maryland court over all local officers, in respect to all matters arising in the district, which, from their nature and quality, would have been subject to the supervision of the Maryland courts, had the cession not been made. But the mere act of adopting the Maryland laws, and of enabling the district courts to administer them, as they were administered by the Maryland courts, could not enable the former to apply those laws to officers of the United States, appointed for the whole nation, in respect to official acts affecting the interests of the whole nation. To authorize such a stretch of power, there must be an express grant of jurisdiction, by act of congress. Until such a law shall be passed, the local courts, in this particular, will stand on precisely the same ground as the Maryland courts did before the cession. When congress sat in New York or Philadelphia, and the officers of the federal government resided there, they were not subject to the supervision, by *mandamus*, of the courts of either of the states within whose territory they resided. Suppose, then, a cession of the city of New York, or of the city of Philadelphia, and an adoption of the state law; how could that have altered the case? As to all matters of local concern, like all other inhabitants, they would be subject to the adopted law; but in their official capacities, they would still have remained, as they were before, exclusively subject to the authority of the general government, acting strictly as such. Suppose, this district had never been ceded to the United States, but the seat of the federal government established here, and all the other circumstances of the present case to have occurred; could the Maryland court have interfered, by *mandamus?* Surely not. How then can that court, which has merely taken the place of the Maryland court, claim, from that fact alone, any greater jurisdiction? The case of the *Columbia Insurance Company* v. *Wheelwright*, 7 Wheat. 534, so much relied on by the other side, does not touch the point. That was a private corporation, not growing out of, nor at all connected with, the federal government, as such. It had, indeed, been created by an act of congress; but in this, congress acted as a local legislature, under the cession; without which, such a corporation could not have been created by the federal government. If the cession had not been made, the Maryland legislature could have done precisely the same thing. But *in creating the post-office department, [*591 and the other executive departments, and in defining the duties of the officers employed in them, as well as in every other law concerning them, congress act entirely irrespective of the cession. Though the officers reside here, yet had no cession been made, every one of these laws might have been passed. On the other hand, if the district were yet subject to the govern-

ment of Maryland, that government could not have interfered with the subjects, nor with any of the officers concerned in them.

It is very true, as contended by the learned counsel, that the Maryland laws cannot be literally enforced here; that all the local officers of the district derive their existence from acts of congress, and that the Maryland law can only be applied to them by analogy; but there is no difficulty in ascertaining the analogy, nor in applying it. Informations in the nature of a *quo warranto* may be entertained, and writs of *mandamus* be issued, by virtue of the adopted law, in every case; except where the duties of the officer exclusively grow out of, and belong to, the federal government. The present case being peculiarly one of this description, the court below acquired no jurisdiction over it, from the mere adoption of the state law. If it has such jurisdiction, it must be derived in some other way.

The third section of the act of February 27th, 1801, cannot help out the jurisdiction, even if that part of the act of February 13th, to which it is said to refer, be regarded as yet in force; because this section refers only to the powers, and not to the jurisdiction, of the court. The distinction between jurisdiction, or cognisance of a court, and the powers or means by which it exercises and enforces its jurisdiction, is a sound and familiar one, and is distinctly marked in all the judiciary acts; and among others, in this very act of the 27th of February 1801, as the court below has itself decided in former cases. Again, there being no special reference to the act of February 13th, the provisions of that law were not so incorporated in the act of February 27th, as to require a special repeal in reference to this district; and when the act of February 13th was repealed, and the act of 1789 revived, and put in force in its stead, with what propriety can it be said, that any part of the repealed law is yet in force? And how unreasonable to suppose, that congress could have intended to leave the repeal imperfect, and to create and keep up an anomalous and unnecessary distinction between the courts in and out of this district? The cases mentioned by the learned *592] *counsel, of English statutes specially referred to and adopted by Maryland statutes; and in respect to which the Maryland courts have correctly held that the subsequent repeal of the English statute does not alter the law of Maryland; differ from the present case in several essential particulars. Not to speak of other differences, the repeal was not made by a legislative act, intended to apply, or capable of applying, to the state of Maryland; whilst here, the act of February 13th, if adopted in the act of February 27th, was also repealed by the same authority.

The jurisdiction of the court below, so far as regards the present case, depends then on the words of the fifth section of the act of February 27th, 1801. These words are, in substance, neither more nor less than the corresponding words in section 11th of the act of 1789; and even if the judicial construction of that section, in *McIntire* v. *Wood*, and *McClung* v. *Silliman*, be inapplicable to the present law; still it has not been shown, that the claim of the relators is a "case in law or equity." If we give to the law the broad construction on which the learned counsel insist, they cannot establish the jurisdiction of the court, unless they can also prove that the case presented in the petition was a "case in law or equity;" in other words, a controversy of a forensic nature, which, according to the established principles and forms of judicial proceedings, was properly

referrible for discussion and decision to the judicial tribunals. The attorney-general referred to the argument of his associate on this point; which, he remarked, had not been answered, nor even attempted to be answered; except by the allegation, so often reiterated, but not proved, that the relators had an absolute, fixed and unconditional legal right to the credits in question, the duty of entering which was imposed on the postmaster-general as a mere ministerial act. If this were, indeed, so, then a "case in law or equity" had been presented, and the *mandamus* will be the proper remedy, if there be no other appropriate means of redress, and the court has received authority to issue it. But the position is untenable.

The relators claim under the special act of July 2d, 1836. They do not refer to, nor could they claim under, any prior act. The attorney-general agreed, that the relators were deeply interested in the benefits proposed to be conferred by this law, and also, that the good faith of the nation was pledged to secure to them all those benefits; unless it should be found, that by some fraud, or material error, congress were induced to grant what they would not otherwise *have given. But it is not every interest, nor even every interest which is guarantied by the faith of the nation, [*593 which is to be dignified by the name of a vested legal right. If the interest be subject to any contingency, by which the right to its enjoyment can be cut off, it is not regarded, in law, as a vested legal right. Now the rights conferred by the act of July 2d, 1836, were subject to such a contingency. They were subject to the power of congress, at any time, before the actual entering of the credit, to amend, alter or repeal the law. After the credit should be entered, congress could not deprive the parties of it; because there is no power, which, after a fact has happened, can cause such fact not to have happened. But at any time prior to the actual entering of the credit, congress had the power to alter or repeal the law. This power was not reserved in terms, in the law; nor was it necessary to be so reserved; it results from the nature of the case. There was no contract made or tendered by the law; the relators were to do no meritorious act under it. It was an act of relief, of grace and favor to them. The proceedings before the solicitor were not like a suit in a regularly-organized court; nor was his award like a judgment of such a court, so as to be out of the reach of the legislative power. It was the ordinary case of a law extending a favor or bounty to a party; and as to all such laws, congress have a *locus pœnitentæ*, so long as the law is unexecuted. The judiciary committee of the senate had no doubt as to the power of congress to repeal the law; though they thought it should not be exercised. This is decisive of the case. If congress had, and if they yet have, the power to modify or repeal, at pleasure, the act under which the relators claim; then it is not a case for the courts of justice at all, or, at least, not a case for a *mandamus*. All the authorities show, and the learned counsel themselves admit, that to entitle a party to this writ, he must show that he has an absolute legal right to some specific thing. But where the interest of a party is liable to be thus affected by the action of the legislature, it is an abuse of terms, to call it a fixed or vested right. It would, indeed, be a strange kind of absolute vested legal right, which is thus liable to be defeated. That the legislature have not interfered, is no answer to this argument; it is enough, that they have a lawful power to do so.

Nor was the duty imposed on the postmaster-general, by the law of 1836, a mere ministerial duty, like that of the clerk of a court, in recording
*594] a judgment, giving copies, &c., to which it has been *compared. It involved an examination of the award, to see that the solicitor had not exceeded his authority, either in giving too wide a scope to the enacting clause, or in violating the provisos. Nothing can be plainer, than that if either were done, the award, *pro tanto*, would be void; precisely like that of any other arbitrator, whose award exceeds the submission. Suppose, the solicitor had made allowances where there was no contract? Or for other contracts than those described in the law? Or had made allowances contrary to the provisos? Will any one contend, that the postmaster-general, seeing these violations of the law, on the face of the award, was yet bound to give the credits thus illegally allowed? If his duty was merely ministerial, if he possessed no authority to look into the award, as contended by the other side; then, however palpable the errors of the solicitor, and however excessive the allowances made by him, the credit is to be given. It would seem to be impossible, that such could have been the design of congress. It was clearly the duty of the solicitor, to confine his allowances within the authority conferred on him by the law; and if so, it was as clearly incumbent on some one, before the credit was given, and the money drawn out of the treasury, to see that the allowances did not extend beyond the law. Who was to do this? In the first instance, at least, the postmaster-general; because on him was specially devolved the duty of executing the award. *Ex necessitate*, therefore, he must look into it, and compare it with the law. Even the other side were compelled to admit this; they concede, too, that some preliminary examination was necessary, to enable him to ascertain the precise duty to be performed. This concession brings the case within the principle of the *Commonwealth* v. *Cochran*, 5 Binn. 87, cited in the opening. According to that case, and the whole current of authorities, where such a special tribunal is created by statute, without giving to the courts, in express terms, any power to supervise and control the action of the officer; all that they can do by *mandamus* is, to compel the officer to take up the subject, and to act upon it; they cannot instruct him how to act. If the officer acts corruptly, he is liable to a private action, at the suit of the party injured; and to indictment, if he decides erroneously: the only remedy, in ordinary cases, is by a further appeal to the legislature; though under the constitution of the United States, if the duty be devolved on an executive officer, his action may indirectly be reached and affected by the president.

*595] *It is in this view of the case, that the constitutional question, as to the power of congress to clothe the judiciary with authority to direct and control the executive, is supposed to arise. The doctrines of his associate and himself, on this head, and more especially those stated by the postmaster-general in his return, had been denounced by the other side, as equally novel, unfounded and alarming. Strong, and perhaps, incautions, expressions, had been quoted from that return; and by separating them from their context, and not attending to the fact, that the writer set out with the position that the duty imposed on him by the law, was an executive and not a ministerial duty, those expressions were made to bear a meaning which their author could never have designed. The like remark is to be made of

the comments on the opinion of the attorney-general, and on the opening argument.

In regard to this branch of the case, the attorney-general said, that he could not consent to be held responsible for any language or reasoning except his own; and that he must protest against the version which had been given to his official opinion. That document, on some of the points discussed in it, might well be found to be erroneous; for it embraced questions by no means of easy solution, and in respect to which, the most enlightened and upright might fairly differ. But as to the constitutional views presented by it, he could not apprehend any serious diversity of opinion among persons tolerably familiar with constitutional law; provided, the points intended to be discussed, were first clearly understood, and then carefully kept in view. He had not denied, and did not intend to deny, on the contrary, he fully admitted, the constitutional power of congress to invest the proper courts of the United States with jurisdiction to issue writs of *mandamus* to any ministerial officer of the United States, to compel the performance of his duty. And as the ordinary character of an officer's functions would not always determine the true nature of a particular duty imposed by law, he further agreed, that if an executive officer, the head of a department, or even the president himself, were required, by law, to perform an act merely ministerial, and necessary to the completion or enjoyment of the rights of individuals, he should be regarded, *quoad hoc*, not as an executive, but as a merely ministerial, officer; and therefore, liable to be directed and compelled to the performance of the act, by *mandamus*, if congress saw fit to give the jurisdiction. In short, he had no controversy with the court below, nor with the learned counsel *for the relators, in respect to the power of congress to authorize the circuit court of this district, or any other [*596 tribunal, inferior to the supreme court, to award a *mandamus* to the postmaster-general, in precisely such a case as that now under discussion; if it be really true, as contended by the court below, and by the other side, that the law of July 1836, imposes on the postmaster-general the performance of a merely ministerial act or duty. The official opinion of June 19th, 1837, begins with the statement that the case was one in which an official duty relating to claims depending in the post-office department, growing out of contracts made with that department, imposed on its head, by his name of office, and in every sense an official executive duty, was sought to be enforced by *mandamus*. This statement, he thought, had not been successfully impeached; and if well founded, it naturally led to the constitutional objection, by which it was merely affirmed, that congress cannot "confer on any court of the United States the power to supervise and control the action of an executive officer of the United States, in any official matter, properly appertaining to the executive department in which he is employed." The remainder of the opinion is devoted to the establishment and illustration of this precise and limited proposition. The argument was chiefly rested on the distribution of the powers of government between three independent departments; the vesting of the executive power in the president, and the duty imposed on him of taking care that the laws be faithfully executed. How has this argument been met by the other side? By imputing to us the most extravagant doctrines in regard to the extent of the ex-

ecutive power; and by maintaining, on their own part, doctrines equally extravagant.

When we say, that the constitution gives to the president the whole executive power, the learned counsel represent us as contending that all executive power, whether conferred by the constitution or not; all executive power which, in any age of the world, and under any form of government, has been vested in the chief executive functionary, is vested in the president of the United States; and they argue with great warmth against this notion —a notion too preposterous to need refutation. What we say is, that all the executive power of the limited federal government created by our constitution, not the executive power of Great Britain, Russia or Turkey, is vested, with certain specified exceptions, in the president. And we mean by this, precisely what is meant, when it is *said, that all the legislative power *597] of this goverment is vested in congress, subject to the qualified *veto* of the president; or when it is said, that all the judicial power conferred by the constitution, is vested in this court and the other courts of the United States, and no more.

The proposition, even as thus limited, is denounced by the other side as slavish in the extreme, although they admit that it is not entirely new. It was first broached, say the counsel, by General Hamilton, in the Letters of Pacificus, but was promptly refuted by Mr. Madison, in Helvidius, and has since remained dormant. Never did gentlemen fall into a greater mistake. That all the executive power proposed to exist in the new government was to be vested in the president, was objected by the opponents, and explicitly admitted by the advocates of the federal constitution, when that instrument was under discussion before the people. General Hamilton, in the Federalist, acknowledged that this was the effect and design of the constitution, but vindicated the arrangement. See Federalist, Nos. 69, 70 and 71. This doctrine was also announced and established by the congress of 1789, in the debates relative to the power of removal, referred to in the opening. It was the very pivot on which that famous discussion turned. The subject had been considerably discussed, before Mr. Madison engaged in the debate. From the moment he entered it, we perceive the presence of a superior intellect, possessing unequalled advantages of knowledge and experience, and displaying itself in the clearest analysis of the principles and meaning of the constitution. He was the first speaker who referred to that clause which declares that the "executive power shall be vested in the president." From that provision, and from the direction that the president "shall take care that the laws be faithfully executed," he deduced the conclusion, that it was "evidently the intention of the constitution, that the first magistrate should be responsible for the executive department." 4 Elliot's Debates 148. He showed, that this principle of unity and responsibility was necessary to preserve that equilibrium which the constitution intended; and to prevent a direction towards aristocracy on the one side, or anarchy on the other (4 Elliot 176); and that to give effect to these principles, the capacity to superintend and control the subordinate officers of the executive department, through the power of removal, had been left in the president alone. 4 Elliot 147–50, 176–83, and 201–3. In these views, a large majority of both houses concurred; *the senate conceding the power against *598] itself: so that, if this doctrine as to the power of removal be really

an unwarrantable interpolation, as the learned counsel say it is, it must be charged on the fathers of the republic. But, whether the particular question as to the power of removal was correctly decided or not; no one, in that debate, disputed the position of Mr. Madison and his associates, that the constitution had actually vested in the president the whole executive power. On the contrary, Messrs. Gerry and others of the minority, expressly conceded it; though they contended, either that the executive power did not include the power of removal; or if it did include it, that in analogy to the power of appointment, it could only be exercised with the consent of the senate. This latter idea had indeed been suggested by General Hamilton, in the 77th No. of the Federalist; though, as has been seen, he had previously laid it down, in prior numbers of that work, and in the strongest terms, that the whole executive power was vested in the president. The whole course of this debate, independently of the conclusion to which it came, is, therefore, utterly irreconcilable with the recent suggestion adopted and maintained by our learned adversaries; that, when the constitution says, "the executive power shall be vested in a president," it only gives a name to the department, and merely means that he shall possess such executive power as the legislature shall choose to confer upon him. The doctrine stated in Pacificus, published in 1793, was, therefore, nothing new. It was merely repeating what General Hamilton had himself said, before the adoption of the constitution, and what had been admitted on all sides, in the debate of 1789. Nor was it denied by Mr. Madison, in the letters of Helvidius; nor, indeed, could he venture to dispute it, after the part taken by him in former discussions. He several times admits it, in terms, and constantly, by implication; but contends, in opposition to Pacificus, that the power to issue a proclamation of neutrality was included in the power of making war and peace, and therefore, belonged to the legislature, and not to the executive. See pages 596–601, Appendix to Washington ed. of Federalist. This view of the constitution, so far, also, from remaining dormant snce 1793, as alleged by the learned counsel, has been announced in every text book on the constitution published since that time, and in every decision of this court in which the point has been discussed, as was abundantly shown in the opening.

*We are able also to answer the call so loudly made, for some decision of the state courts, in which it has been held, that similar [*599 words, in a state constitution, vest in a governor the executive power. The precise point was adjudged in the *Commonwealth* v. *Bussier*, 5 Serg. & R. 451, on the constitution of Pennsylvania.

In regard to the president's responsibility for the officers of the executive department, and his power to supervise and control them, we intend to assert only what was admitted in the Federalist, and maintained by Mr. Madison, and those who concurred with him in the debates of 1789; and nothing more than has been understood by every president, from Washington inclusive, to belong to the high trust with which he is clothed. In the writings of Washington, recently published, his habit of directing all the heads of departments in the discharge of their duties, constantly appears. Nor does the idea, suggested by the court below, and before advanced by others, that the secretary of the treasury was not subject to this direction to so great an extent as the other heads of departments, derive any coun-

tenance from this correspondence. On the contrary, it will be seen, that on one occasion, Gen Hamilton complained that President Washington did not take so large a share of the responsibility of some fiscal arrangements as the secretary thought he ought to bear. Sparks' Writings of Washington, vol. 10, p. 396, 554. When, therefore, the learned counsel affirm, that the principle is now, for the first time, broadly asserted; they speak, to say the least, with very little historic accuracy. And when they represent us as pressing it to the extent of claiming for the president a power to direct, instruct and control every officer appointed by him, judges as well as others show a great want of perspicuity on our part, or of attention on theirs. Our position is confined to the executive department; we speak of that alone; and we affirm, equally with the other side, the absolute independence of the judiciary, when proceeding in its appropriate sphere.

The practical inferences supposed by the other side to result from this doctrine, we must also repudiate. Where the president has controlled and directed the action of the inferior executive officer, they contend, that the inferior is not responsible; and as the president's liability to private action has been doubted, there will, then, it is said, be no responsibility. The answer is, that whenever the president takes an active part in an illegal action, to the injury of an individual, though it be done by the hand of
*600] his subordinate, he *will be responsible in a civil suit, along with that subordinate; and that the latter cannot be excused for doing an unlawful act, by pleading the command of his official superior. This is the rule of the common law, in an analogous case of master and servant. 1 Bl. Com. 430. The subordinate officer is not obliged to do any act which he believes to be unlawful; if the president insists on it, he may resign, or refuse and take the chance of a removal.

Nor do we claim for the president any power to forbid or dispense with the execution of an act of congress, even though it relate to matters purely executive; nor have we ever affirmed, that a citizen, interested in the execution of such an act, is obliged to submit his claims to the arbitrary determination of that functionary. It was with great propriety, that the learned counsel, when bringing this charge against his associate and himself, had referred to the malicious and unsupported accusation made by a tory house of commons against one of the best patriots and soundest constitutional lawyers England ever produced, Lord Somers. What we say is, that where congress pass a law for the guidance and government of the executive, in matters properly concerning the executive department, it belongs to the president to take care that this law be faithfully executed; and we apply to such a case the remark of Gen. Hamilton, in Pacificus, that "he who is to execute the laws, must first judge for himself of their meaning." Pacificus, Letter 1st. If, therefore, the executive be clearly satisfied as to the meaning of such a law, it is his bounden duty to see that the subordinate officers of his department conform with fidelity to that meaning; for no other execution, however pure the motive from which it springs, is a faithful execution of the law. In a case of this kind, one which thus concerns the proper executive business of the nation, we do, indeed, deny the power of the judiciary to interfere in advance, and to instruct the executive officer how to act for the benefit of an individual who may have an interest in the subject; but we hold, that every officer, from the lowest to the highest,

who, in executing such a law, violates the legal rights of any individual, is liable to private action; and if his act proceed from corrupt motives, to impeachment, and in some cases, to indictment also. And we also agree, as has already been admitted, that when an act of congress imposes on an officer of the executive department, for the benefit of a private party, a duty purely ministerial, the performance of that duty may be coerced by *mandamus*, by any court to which the necessary jurisdiction shall have been given.

*Another of the practical inferences imputed to his associate and himself, related to the capacity of the judiciary department to execute its judgments. A strong and somewhat unguarded expression in the return of the plaintiff in error, had been made the theme of much animadversion; the comments which it was supposed to justify, were extended to the official opinion of the attorney-general; and this latter document, it was said, pressed the argument to an extent which would deprive the courts of the power to issue any process, or exercise any jurisdiction whatsoever. As suggested in a former part of the argument, the language of the postmaster-general had received an interpretation which was doubtless repugnant to the meaning of its author; but however this might be, the attorney-general, speaking for himself, could truly say, that the sentiments imputed to him were never designed to be expressed; and on a fair construction of his language, he did not think they could be found in his official opinion. Having adopted the impression, whether correctly or not, it was not for him to say, that the duty assigned to the postmaster-general by the special act of July 1836, was not a mere ministerial duty; but a duty which appertained to the regular official business of the department, as a branch of the executive; the opinion proceeded to show, that the writ of *mandamus* could not be issued to the head of an executive department, to instruct and direct him in the performance of an official executive duty. Among other arguments, the inability of the judiciary to enforce any commands they might address to the executive officers, was insisted on, and illustrated by the supposed case of the officer refusing to obey the *mandamus;* and on his being committed to prison for the contempt, the president's removing him from office, and so defeating, *ad infinitum*, if he pleased, the execution of the writ; thus showing, that without the consent of the executive, a peremptory *mandamus* to an executive officer, must for ever remain inoperative. If this argument be confined, as was intended, to the case of a *mandamus* commanding the performance of an act strictly executive; no one, it is believed, can prove it to be unsound. To mark still more clearly the class of cases referred to, and to show that the independence and completeness of the judicial power were not intended to be impugned; it was carefully observed, that "in cases which properly refer themselves to the judiciary, it is rarely or never possible to defeat, in this way, the ultimate execution of the judgment of the court;" a passage, by the way, which the learned *counsel in their animated comments on this part of the opinion, had strangely overlooked. He, therefore, entirely agreed with his learned adversaries, that in all cases to which the judicial power extended, neither the executive nor the legislature could, rightfully, interfere with the judgments of the courts, much less "strike dead their process in the hands of the marshal." It was, perhaps, to prevent any abuse of the power of removal by the executive, as well as to avoid inconvenience and delay, that

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the provision referred to by the other side, and by the court below, authorizing the marshal, though removed, to execute any process in his hands, was inserted in the act of 1789. This provision, however, does not apply to a *mandamus;* which is directed, not to the marshal, but to the officer who is to do the act required; and if that officer be the head of an executive department, there is, and there can be, no law to prevent the president from removing him at pleasure.

With this notice of some of the strictures on his official opinion, he was content to leave the general exposition of his views, on this branch of the case, to that paper, and would proceed to consider the doctrine, so strenuously pressed, that under the constitution of the United States, it is competent for congress, if they think proper, to empower the judiciary to supervise, direct and control any officer of the executive department, in respect to any matter whatsoever. The learned counsel were driven to this extremity, in order to sustain the judgment of the court below, in the event of its being held, that the duty assigned to the postmaster-general was not a ministerial but an executive one. The constitution, say the learned counsel, does not expressly except any officer of the United States, nor any act of any such officer, from the general grant of judicial power; and therefore, the legislature may extend that power to every such officer and act: and, indeed, should do so, in order that the judicial power may be co-extensive with the operation of the other departments. The post-office department, they further say, and all the officers employed in it, including its head, derive their existence from acts of congress passed in pursuance of the constitution; and the power which creates these officers may subject them to the supervision of the judiciary, and may empower the judiciary to direct and control them. The like power to authorize the judiciary to direct and control, in advance, the action of the executive officers, was endeavored to be inferred from the admitted fact, that these officers were liable, as individuals, to private action and to indictment; and *that this liability had often been declared and enforced by act of congress. This doctrine may, indeed, be pronounced not only novel, but utterly repugnant to the theory of the constitution; and to the best considered and most authoritative expositions of its meaning. In the note to *Hayburn's Case*, 2 Dall. 409, the reasons of the judges of the circuit courts, including all the judges of this court, for not executing the pension act of the 23d of March 1792, are given at length. The New York circuit court, consisting of Chief Justice Jay, Cushing, Justice, and Duane, District Judge, were "unanimously of opinion, and agreed, that by the constitution of the United States, the government thereof is divided into three distinct and independent branches; and that it is the duty of each to abstain from, and to oppose encroachments on either. That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner." The judges in the other circuits expressed the same proposition, though in somewhat different words; and they all concurred in treating the law as unconstitutional, and in declining the functions assigned them, because they were not of a judicial nature. The axiom thus laid down by this high authority, an axiom plainly resulting from the distribution of powers made by the constitution, overthrows, from the foundation, all this part of the opposing argument.

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The attorney-general said, that he had always regarded the opinions of the judges in the pension case, as entitled to the very highest respect. They were founded on the maturest deliberation; and were uttered very soon after the organization of the government, and before political parties had been formed with reference to any particular construction of the constitution. When his own views as to the independence of the different departments were denounced by his learned adversaries, as revolutionary and disorganizing; he was consoled by the reflection, that the like charge had insinuated, and even by the incumbent of the office he had the honor to fill, against the opinions above quoted. See letter of Attorney-General Randolph to President Washington, of August 5th, 1792, 10 Sparks' Writings of Washington, 513. The fame of Chief Justice JAY and his associates had not been injured by these strictures; and those who merely repeat their language, are equally secure against any permanent injustice.

As to the numerous cases cited from the English books, and from our own reports, in which actions for damages had been brought *against public officers of all descriptions, for acts done by them in their official capacities; it was sufficient to say, that the liability of every officer of this government to private action and to public prosecution, in appropriate cases, had been repeatedly conceded. But none of these cases touch the point now in dispute; for no one of them involves any attempt, on the part of the court, to direct the officer in the performance of his duty. This, it is said, has been done in the injunction cases cited from 4 Simons 13; 6 Pet. 470; and 6 Simons 214; and other cases of the like nature. It will be seen, however, that in the first of these cases (4 Simons 13), the injunction was issued to restrain the commissioners of woods and forests from erecting a building, in violation of an agreement entered into by them with the plaintiffs, to whom they had leased an adjoining tract; and that in all the others, the real controversy was between individuals, litigating in relation to moneys held by the treasury officers as trustees or stockholders; moneys received under treaties, &c., and not belonging to the government, but to one or other of the litigating parties. Injunctions to the treasury officers are issued by the courts of equity, in these latter cases, on the same principle on which they are issued, in analogous cases, to banks and other depositories; that is, to preserve the funds in controversy, until the party really entitled can be ascertained. When such injunctions are served on the secretary of the treasury, they are usually observed; but it has not been supposed that they were obligatory. [*604

When this case was before the court below, it was urged as a strong reason against the application, that no instance could be found in the English books, in which a *mandamus* "had been issued to any officer of the executive departments." The learned counsel could not then produce any such case, and the court conceded that they had not found any. *The King* v. *Lords Commissioners of the Treasury*, 5 Nev. & Man. 589, a case, not in the country where this controversy began, is not referred to as one of this description. It was there admitted, on all sides, that a *mandamus* had never been issued to such officers; and though the writ was awarded, all the judges put it expressly on the ground, that the money in question had been appropriated by parliament for the use of the relator, and had been

drawn out of the treasury, and placed in the hands of a paymaster appointed by the defendants, and subject to their order; and that they were to be so considered as mere trustees or stockholders, of moneys belonging, not to
*605] the public, but to the relator. *Nevil's *Case*, Plowd. 377; the *Banker's Case*, 14 Howell's State Trials, and the other cases of petitions to the barons of the exchequer, depend on the political organization and functions of the English exchequer; and the writs issued in those cases to the treasury officers, are not to be confounded with the prerogative writ of *mandamus*, which can only emanate from the king's bench. In the New York case, 10 Wend. 25, the *mandamus* was directed to the canal commissioners; officers charged, it is true, with the care of a very important public work, but not a part of the state executive. In principle, their functions were precisely like those of surveyors, and commissioners of highways and sewers; ministerial officers, to whom writs of *mandamus* have often been directed in England.

Several of the other cases cited from the state courts, are of the like nature; and no one of them assumes a power to direct an executive officer in the discharge of a matter properly appertaining to his official functions. In the Tennessee case, cited in the opening (1 Cooke 214), such a power was expressly disclaimed. And in 5 Binn. 105, Chief Justice TILGHMAN refused a *mandamus* to the state treasurer, because it would be but another mode of suing the commonwealth; thus applying the maxim of common sense and good morals, that what the law will not allow you to do directly, you shall not attempt to do indirectly. But English cases, and even cases from our state courts, however useful in furnishing principles and analogies, cannot determine a question arising on the constitution of the United States. Aware of this, the learned counsel had chiefly relied on the cases of *Marbury* v. *Madison*, 1 Cranch 137; *McIntire* v. *Wood*, 7 Ibid. 504; and *McClung* v. *Silliman*, 6 Wheat. 598. In the first of these, it was said the broad principle had been established, that in all cases where an individual was interested in the discharge of an official act, by an executive officer, the writ of *mandamus* was the appropriate remedy to compel the performance of such act; and the other cases were referred to, as confirming this doctrine. In regard to these authorities, the attorney-general referred to the observations in his official opinion in the record, and to the opening argument; and conceded, that if Chief Justice MARSHALL was correct, in considering the appointment of Marbury as complete, by the signing and sealing of the commission, and in holding that the thereby acquired a vested legal right to the office, and to the commission, as the evidence of it, and that the secretary held the commission as a mere depositary, for the
*606] personal and exclusive benefit *of Marbury; there could then be no doubt, that a *mandamus* might be issued, consistently enough with the constitution; because the delivery of the commission would, in that case, be a mere ministerial act, and the secretary of state, *quoad hoc*, a mere ministerial officer.

In this view of the case, he assented to the comment of Justice STORY, that no lawyer could doubt the power of congress to authorize the proper courts to issue a *mandamus* in such a case; and to the similar declaration of Justice JOHNSON, in 6 Wheaton; and of Justice THOMPSON, in 1 Paine. This, however, falls very short of the doctrine now under consideration, a

doctrine which claims for the legislature the power to confer on the courts of justice unlimited authority to supervise and control executive officers, in all matters whatsoever. In support of this position, the 13th section of the judiciary act of 1789, had been invoked, as a legislative declaration that writs of *mandamus* might be issued to any officers of the United States, executive as well as others. And it was said, that although this section had been decided in *Marbury* v. *Madison* to be unconstitutional, as attempting to give to the supreme court an original jurisdiction in this respect; yet that it was entitled to respect, in the point now under discussion. Independently of any other answer, it was enough to say, that the section confined the writ to cases "warranted by the principles and usages of law;" that the principles of law forbid the issuing of a *mandamus*, except in cases strictly of judicial cognisance; and especially forbid the interference of courts of justice with executive functions; and that the usages in England and in this country, are in accordance with these principles. In the cases of the *United States* v. *Arredondo and others*, 6 Pet. 763; 9 Ibid. 172, &c., the United States, in order to execute the stipulations for the protection of private property contained in the Florida treaty, consented to appear in court, at the suit of the claimant; gave the courts ample authority to decide on the validity of claims under the treaty; and empowered them, when a claim was established, to issue a mandate to a ministerial officer to make the necessary survey and execution of the decree. The irrelevancy of this procedure to the present discussion is obvious. Nor did this part of the opposing argument derive any support from any of the post-office laws to which the learned counsel had referred; there being no provision in the sections which had been quoted, which empowered the judiciary to interfere, in any way, except by taking cognisance of suits regularly instituted.

*In conclusion, the attorney-general insisted, that even if the postmaster-general could properly be regarded in this case as a mere ministerial officer, and if the relators could be considered as having a vested legal right to the credits in question; still the court below had no jurisdiction to issue the *mandamus*, because its authority in this respect was no greater than that of the ordinary circuit courts. It was deserving of notice, that no attempt had been made by the other side, to explain how it happened that this extended jurisdiction had never before been exercised or asserted; although cases calling for its exercise must frequently have occurred. [*607

But suppose this objection out of the way; suppose the jurisdiction clear, and the legal right of the relators to the credits claimed by them admitted; yet the court erred in awarding the *mandamus*. It is not every case of the denial of a vested legal right, which is to be redressed by this writ. It must appear, that there is no other specific legal remedy. In the present case, if the rights of the relators be such as their counsel represent, an action on the case will plainly lie; this is conceded. But we are told, that the recovery in such an action, will be only for the damages prior to the commencement of the suit, and that they will be obliged to bring new suits *ad infinitum*. This, however, cannot be necessary, if in the first action the plaintiff choose to go for the total damages. Then it is said, that the damages may not be collected; and if collected, that the relators will not get the specific thing, the entry of the credits. This objection might have been made in each of the cases cited in the opening, where the liability of the

defendant to an action on the case, was held a sufficient reason for denying the *mandamus*.

Nor does it follow, even if the ultimate efficiency of the legal remedy by action be really doubtful, that a *mandamus* is to be issued. This is not one of those writs which is demandable of strict right; the courts exercise a sound, legal discretion, in awarding it. Being founded on the prerogative of the crown, the English court of king's bench will not issue it, unless there be a real necessity for it. There must be a *nodus*, and one, too, *dignus vindice;* or the court will not interpose. This discretion the court below was bound to exercise; and if this court see that they have violated it, the judgment may, and should be, reversed. Now, it appears by the record, not only that congress have full power to settle this whole controversy, and to give to the relators all they claim; but that they have applied to congress for relief, and that their application is still pending. In this *608] posture *of the case, is it discreet for the court to interfere by *mandamus?* Suppose, a resolution by the directors of a bank or other moneyed corporation, instructing their cashier to pay certain moneys to a creditor of the corporation; the cashier makes a question as to the meaning of the resolution, and refers the party to the directors for further instruction; suppose, the party to apply to them, but before his application is decided, to ask for a *mandamus;* would it be a sound exercise of legal discretion to interfere? Would not the party be told, that he had selected his remedy, and that he must pursue it to a conclusion, before he could ask for this prerogative writ? But the relators say, that congress will not pass any further law. How can this be judicially known? And why will not congress pass a further law? Because, say the relators, they consider the case so very plain, that no new law is necessary. This, one would think, would justify an expectation directly the reverse. At any rate, the subject having been actually referred to congress, by the executive; and the relators having gone to that body, it would seem to be manifestly indiscreet and improper, for the courts to interfere, until some more serious attempt be made to obtain the direction of that department to which the disposition of the public treasury peculiarly belongs.

Thompson, Justice, delivered the opinion of the court.—This case comes up on a writ of error from the circuit court of the United States for the district of Columbia, sitting for the county of Washington. This case was brought before the court below, by petition, setting out certain contracts made between the relators and the late postmaster-general, upon which they claimed certain credits and allowances upon their contracts for the transportation of the mail, That credits and allowances were duly made by the late postmaster-general. That the present postmaster-general, when he came into office, re-examined the contracts entered into with his predecessor, and the allowances made by him, and the credits and payments which had been made; and directed that the allowances and credits should be withdrawn, and the relators re-charged with divers payments they had received. That the relators presented a memorial to congress on the subject, upon which a law was passed on the 21st of July 1836, for their relief; by which the solicitor of the treasury was authorized and directed to settle and adjust

the claims of the relators, *for extra services performed by them; to inquire into and determine the equity of such claims; and to make the relators such allowances therefor, as, upon full examination of all the evidence, may seem right, according to the principles of equity. And that the postmaster-general be and he is hereby directed, to credit the relators with whatever sum or sums of money, if any, the solicitor shall so decide to be due to them, for and on account of any such service or contract. And the petition further sets out, that the solicitor, Virgil Maxcy, assumed upon himself the performance of the duty and authority created and conferred upon him by the law, and did make out and communicate his decision and award to the postmaster-general; by which award and decision the relators were allowed $161,563.89. That the postmaster-general, on being notified of the award, only so far obeyed and carried into execution the act of congress, as to direct, and cause to be carried to the credit of the relators, the sum of $122,102.46. But that he has, and still does refuse and neglect to credit the relators with the residue of the sum so awarded by the solicitor, amounting to $39,462.43. And the petition prayed the court, to award a *mandamus*, directed to the postmaster-general, commanding him fully to comply with, obey and execute the said act of congress, by crediting the relators with the full and entire sum awarded in their favor by the solicitor of the treasury. Such proceedings were afterwards had in the case, that a peremptory *mandamus* was ordered, commanding the said Amos Kendall, postmaster-general, forthwith to credit the relators with the full amount awarded and decided by the solicitor of the treasury to be due to the relators.

The questions arising upon this case, may be considered under two general inquiries: 1. Does the record present a proper case for a *mandamus?* and if so, then, 2. Had the circuit court of this district jurisdiction of the case, and authority to issue the writ?

Under the first head of inquiry, it has been considered by the counsel on the part of the postmaster-general, that this is a proceeding against him to enforce the performance of an official duty. And *the proceeding has been treated as an infringement upon the executive department [*610 of the government; which has led to a very extended range of argument on the independence and duties of that department; but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceedings in this case interfere, in any respect whatever, with the rights or duties of the executive; or that it involves any conflict of powers between the executive and judicial departments of the government. The *mandamus* does not seek to direct or control the postmaster-general in the discharge of any official duty, partaking in any respect of an executive character; but to inforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control.

We shall not, therefore, enter into any particular examination of the line to be drawn between the powers of the executive and judicial departments of the government. The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond

that, all are subject to regulations by law, tonching the discharge of the duties required to be performed.

The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not, and certainly cannot be claimed by the president. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.

Let us proceed, then, to an examination of the act required by the *mandamus* to be performed by the postmaster-general; and his obligation to perform, or his right to resist the performance, must *depend upon the act of congress of the 2d of July 1836. This is a special act for the relief of the relators, Stockton & Stokes; and was passed, as appears on its face, to adjust and settle certain claims which they had for extra services, as contractors for carrying the mail. These claims were, of course, upon the United States, through the postmaster-general. The real parties to the dispute were, therefore, the relators and the United States. The United States could not, of course, be sued, or the claims in any way enforced against the United States, without their consent obtained through an act of congress; by which they consented to submit these claims to the solicitor of the treasury, to inquire into and determine the equity of the claims, and to make such allowance therefor, as upon a full examination of all the evidence, should seem right, according to the principles of equity. And the act directs the postmaster-general to credit the relators with whatever sum, if any, the solicitor shall decide to be due to them, for or on account of any such service or contract. The solicitor did examine and decide that there was due to the relators, $161,563.93; of this sum, the postmaster-general credited them with $122,101.46: leaving due the sum of $39,472.47, which he refused to carry to their credit. And the object of the *mandamus* was to compel him to give credit for this balance.

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Under this law, the postmaster-general is vested with no discretion or control over the decisions of the solicitor; nor is any appeal or review of that decision provided for by the act. The terms of the submission was a matter resting entirely in the discretion of congress; and if they thought proper to vest such a power in any one, and especially, as the arbitrator was an officer of the government, it did not rest with the postmaster-general to control congress, or the solicitor, in that affair. It is unnecessary to say, how far congress might have interfered, by legislation, after the report of the solicitor. But if there was no fraud or misconduct in the arbitrator, of which none is pretended or suggested; it may well be questioned, whether

the relators had not acquired such a vested right, as to be beyond the power of congress to deprive them of it.

But so far from congress attempting to deprive the relators of the *benefit of the award, they may be considered as impliedly sanction- [*612 ing and approving of the decisions of the solicitor. It is, at least, so to be considered, by one branch of the legislature. After the postmaster-general had refused to credit the relators with the full amount of the award of the solicitor, they, under the advice of the president, presented a memorial to congress, setting out the report of the solicitor, and the refusal of the postmaster-general to give them credit for the amount of the award, and praying congress to provide such remedy for the denial of their rights, as in their wisdom might seem right and proper. Upon this memorial, the judiciary committee of the senate made a report, in which they say, "that congress intended the award of the solicitor to be final, is apparent from the direction of the act, that the postmaster-general be and he is hereby directed, to credit such mail contractors with whatever sum the solicitor shall decide to be due to them." If congress had intended to revise the decision of the solicitor, the postmaster-general would not have been directed to make the payment, without the intervention or further action of congress. That unless it appeared, which is not suggested by any one, that some cause exists, which would vitiate or set aside the award between private parties, before a judicial tribunal, the committee cannot recommend the interference of congress to set aside this award, and more especially, as it has been made by a high officer, selected by the government; and the committee conclude their report with a resolution, "that the postmaster-general is fully warranted in paying, and ought to pay, to William B. Stokes and others, the full amount of the award of the solicitor of the treasury:" which resolution was unanimously adopted by the senate. After such a decided expression of the opinion of one branch of congress, it would not have been necessary to apply to the other. Even if the relators were bound to make any application to congress for relief, which they clearly were not; their right to the full amount of the credit, according to the report of the solicitor, having been ascertained and fixed by law, the enforcement of that right falls properly within judicial cognisance.

It was urged at the bar, that the postmaster-general was alone subject to the direction and control of the president, with respect to the execution of the duty imposed upon him by this law; and this right of the president is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be *faithfully executed. This is a [*613 doctrine that cannot receive the sanction of this court. It would be vesting in the president a dispensing power, which has no countenance for its support, in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the president with a power entirely to control the legislation of congress, and paralyze the administration of justice.

To contend, that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible. But although the argument necessarily leads to such a result, we do not perceive from the case, that any such power has been claimed by the president. But on

the contrary, it is fairly to be inferred, that such power was disclaimed. He did not forbid or advise the postmaster-general to abstain from executing the law, and giving the credit thereby required; but submitted the matter in a message to congress. And the same judiciary committee of the senate report thereupon, in which they say, "the president, in his message, expresses no opinion in relation to the subject under consideration, nor does he recommend the adoption of any measure whatever; he communicates the report of the postmaster-general, the review of that report by the solicitor of the treasury, and the remarks of the postmaster general in answer thereto, together with such vouchers as are referred to by them respectively. That the committee have considered the documents communicated, and cannot discover any cause for changing their opinion upon any of the principles advanced in their former report upon this subject, nor the correctness of their application to this case; and recommend the adoption of the resolution before reported." Thus, upon a second and full consideration of the subject, after hearing and examining the objections of the postmaster-general, to the award of the solicitor, the committee report, that the postmaster-general ought to pay to the relators the amount of the award.

The right of the relators to the benefit of the award ought now to be considered as irreversibly established; and the question is, whether they have any, and what remedy? The act required by the law to be done by the postmaster-general is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial; and about which the postmaster-general had no discretion whatever.

*614] *The law, upon its face, shows the existence of accounts between the relators and the post-office department. No money was required to be paid; and none could have been drawn out of the treasury, without further legislative provision, if this credit should over-balance the debit standing against the relators. But this was a matter with which the postmaster-general had no concern. He was not called upon to furnish the means of paying such balance, if any should be found; he was simply required to give the credit. This was not an official act, in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act, in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act.

And in this view of the case, the question arises, is the remedy by *mandamus* the fit and appropriate remedy? The common law, as it was in force in Maryland, when the cession was made, remained in force in this district. We must, therefore, consider this writ as it was understood at the common law, with respect to its object and purpose, and varying only in the form required by the different character of our government. It is a writ, in England, issuing out of the king's bench, in the name of the king, and is called a prerogative writ, but considered a writ of right; and is directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate specific remedy. Such a writ, and for such a

purpose, would seem to be peculiarly appropriate to the present case. The right claimed is just and established by positive law ; and the duty required to be performed is clear and specific, and there is no other adequate remedy.

The remedies suggested at the bar were, then, an application to congress ; removal of the postmaster-general from office ; and an action against him for damages. The first has been tried and failed. The second might not afford any certain relief, for his successors might withhold the credit in the same manner ; and besides, such extraordinary measures are not the remedies spoken of in the law which will supersede the right of resorting to a *mandamus ;* and it is seldom that a private action at *law will afford [*615 an adequate remedy. If the denial of the right be considered as a continuing injury, to be redressed by a series of successive actions, as long as the right is denied ; it would avail nothing, and never furnish a complete remedy. Or, if the whole amount of the award claimed should be considered the measure of damages, it might, and generally would, be an inadequate remedy, where the damages were large. The language of this court, in the case of *Osborn* v. *United States Bank*, 9 Wheat. 844, is, that the remedy by action in such cases would have nothing real in it. It would be a remedy in name only, and not in substance ; especially, where the amount of damages is beyond the capacity of a party to pay.

That the proceeding on a *mandamus* is a case within the meaning of the act of congress, has been too often recognised in this court to require any particular notice. It is an action or suit brought in a court of justice, asserting a right ; and is prosecuted according to the forms of judicial proceedings.

The next inquiry is, whether the court below had jurisdiction of the case, and power to issue the *mandamus?* This objection rests upon the decision of this court, in the cases of *McIntire* v. *Wood*, 7 Cranch, 504 ; and *McClung* v. *Silliman*, 6 Wheat. 598. It is admitted, that those cases have decided that the circuit courts of the United States, in the several states, have not authority to issue a *mandamus* against an officer of the United States. And unless the circuit court in the district of Columbia has larger powers in this respect, it had not authority to issue a *mandamus* in the present case. It becomes necessary, therefore, to examine with attention the ground on which those cases rested. And it is to be observed, that although the question came up under the names of different parties, it related to the same claim in both ; and, indeed, it was before the court at another time, which is reported in 2 Wheat. 369.

The question, in the first case, originated in the circuit court of the United States, in Ohio, and came to this court on a certificate of division of opinion. The second time, it was an original application to this court, for the *mandamus*. The third time, the application was to the state court, and was brought here by writ of error, under the 25th section of the judiciary act. By the first report of the case, in 7 Cranch, it appears that the application to the circuit court was for a *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of *purchase for certain lands in that state, and the court, in giving its judg- [*616 ment, say, the power of the circuit courts to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. But it is added, if the 11th section of the

judiciary act had covered the whole ground of the constitution, there would be much ground for exercising this power, in many cases wherein some ministerial act is necessary to the completion of an individual right, arising under the laws of the United States; and then the 14th section of the act would sanction the issuing of the writ for such a purpose. But that although the judicial power under the constitution extends to all cases arising under the laws of the United States, the legislature have not thought proper to delegate that power to the circuit courts, except in certain specified cases. The decision, then, turned exclusively upon the point, that congress had not delegated to the circuit courts all the judicial power that the constitution would authorize; and admitting, what certainly cannot be denied, that the constitution is broad enough to warrant the vesting of such power in the circuit courts; and if in those courts, it may be vested in any other inferior courts; for the judicial power, says the constitution, shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish.

It is not designated by the court, in the case of *McIntire* v. *Wood*, in what respect there is a want of delegation to the circuit courts of the power necessary to take cognisance of such a case and issue the writ. It is said, however, that the power is confined to certain specified cases, among which is not to be found that of issuing a *mandamus* in such a case as was then before the court. It is unnecessary to enter into a particular examination of the limitation upon the power embraced in this 11th section of the judiciary act. There is, manifestly, some limitation. The circuit courts have certainly not jurisdiction of all suits or cases of a civil nature, at common law and in equity. They are not courts of general jurisdiction in all such cases; and an averment is necessary bringing the case within one of the specified classes. But the obvious inference from the case of *McIntire* v. *Wood*, is, that under the constitution, the power to issue a *mandamus* to an executive officer of the United States, may be vested in the inferior courts of the United States; and that it is the appropriate writ, and proper to be employed, agreeable to the principles and usages of law, to compel the per-
*617] formance of a ministerial *act, necessary to the completion of an individual right, arising under the laws of the United States. And the case now before the court, is precisely one of that description; and if the circuit court of this district has the power to issue it, all objection arising either from the character of the party, as an officer in the executive department of the government, or from the nature of the act commanded to be done, must be abandoned.

An application for a *mandamus*, founded on the same claim, was made to this court, under the name of *McCluny* v. *Silliman*, as reported in 2 Wheat. 369; and the application was refused, on the authority of *Marbury* v. *Madison*, 1 Cranch 137, that this court had no original jurisdiction in such cases. The case came up again, under the name of *McClung* v. *Silliman*, 6 Wheat. 598, on a writ of error to a state court, under the 25th section of the judiciary act; and the only question directly before the court, was, whether a state court had authority to issue a *mandamus* to an officer of the United States, and this power was denied. Mr. Justice JOHNSON, who gave the opinion, and who had given the opinion of the court in *McIntire* v. *Wood*, alluded to that case, and gave some account of the application

and the grounds upon which the court decided it; and observes, that the *mandamus* asked for in that case, was to perfect the same claim, and, in point of fact, was between the same parties; and in answer to what had been urged at the bar, with respect to the character of the parties, says, that case did not turn upon that point; but that both the argument of counsel, and the decision of the court, show that the power to issue the *mandamus* in that case, was contended for as incident to the judicial power of the United States; and that the reply to the argument was, that although it might be admitted, that this controlling power over its ministerial officers would follow from vesting in its courts the whole judicial power of the United States; the argument fails here, since the legislature has only made a partial delegation of its judicial powers to the circuit courts. That all cases arising under the laws of the United States, are not, *per se*, among the cases comprised within the jurisdiction of the circuit courts, under the provisions of the 11th section. It is, he says, not easy to conceive, on what legal ground a state tribunal can, in any instance, exercise the power of issuing a *mandamus* to a register of a land-office. The United States have not thought proper to delegate that power to their own courts. But *when in the case of *Marbury* v. *Madison*, and *McIntire* v. *Wood*, this court decided against the exercise of that power, the idea never presented itself to any one, that it was not within the scope of the judicial power of the United States, although not vested by law in the courts of the general government. And no one will contend, that it was among the reserved powers of the states, because not communicated by law to the courts of the United States. [*618

The result of these cases, then, clearly is, that the authority to issue the writ of *mandamus* to an officer of the United States, commanding him to perform a specific act, required by a law of the United States, is within the scope of the judicial powers of the United States, under the constitution. But that the whole of that power has not been communicated by law to the circuit courts; or, in other words, that it was then a dormant power, not yet called into action, and vested in those courts; and that there is nothing growing out of the official character of the party, that will exempt him from this writ, if the act to be performed is purely ministerial.

It must be admitted, under the doctrine of this court in the cases referred to, that unless the circuit court of this district is vested with broader powers and jurisdiction in this respect, than is vested in the circuit courts of the United States in the several states, then the *mandamus* in the present case was issued without authority. But in considering this question, it must be borne in mind, that the only ground on which the court placed its decision, was, that the constitutional judicial powers on this subject had not been imparted to those courts.

In the first place, the case of *Columbian Insurance Co.* v. *Wheelwright*, 7 Wheat. 534, furnishes a very strong, if not conclusive, inference, that this court did not consider the circuit court of this district as standing on the same footing with the circuit courts in the states; and impliedly admitting that it had power to issue a *mandamus* in a case analogous to the present. A *mandamus* in that case had been issued by the circuit court of this district, to compel the admission of the defendants in error to the offices of directors in the Columbian Insurance Company, and the case was brought before this

court by writ of error; and the court decided, that a writ of error would lie, and directed affidavits to be produced as to the value of the matter in controversy. But it not appearing that it amounted to $1000, the sum required to give this court appellate jurisdiction from the final judgments or decrees of
*619] *the circuit court of this district, the writ of error was afterwards quashed. I would seem to be a reasonable, if not a necessary, conclusion, that the want of a sufficient value of the matter in controversy, was the sole ground upon which the writ of error was quashed or dismissed. If it had been on the ground, that the court below had not jurisdiction in the case, it can hardly be believed, that the court would have directed affidavits to be produced of the value of the matter in controversy. This would have been an act perfectly nugatory, and entirely unavailable, if the matter in controversy had been shown to be above the value of $1000. If the want of jurisdiction in the circuit court had been the ground on which the writ of error was quashed, the same course would have been pursued as was done in the case of *Custiss* v. *Georgetown and Alexandria Turnpike Co.*, 6 Cranch 233, where the writ of error was quashed, on the ground that the court below had not cognisance of the matter.

But let us examine the act of congress of the 27th of February 1801, concerning the district of Columbia, and by which the circuit court is organized, and its powers and jurisdiction pointed out. And it is proper, preliminarily, to remark, that under the constitution of the United States, and the cessions made by the states of Virginia and Maryland, the exercise of exclusive legislation, in all cases whatsoever, is given to congress. And it is a sound principle, that in every well-organized government, the judicial power should be co-extensive with the legislative, so far, at least, as private rights are to be enforced by judicial proceedings. There is, in this district, no division of powers between the general and state governments. Congress has the entire control over the district, for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice. The circuit court here is the highest court of original jurisdiction; and if the power to issue a *mandamus* in a case like the present exists in any court, it is vested in that court.

Keeping this consideration in view, let us look at the act of congress. The first section declares, that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the district which
*620] was ceded by that state to the United States; which is *the part lying on this side the Potomac, where the court was sitting when the *mandamus* was issued. It was admitted on the argument, that at the date of this act, the common law of England was in force in Maryland, and, of course, it remained and continued in force in this part of the district; and that the power to issue a *mandamus* in a proper case, is a branch of the common law, cannot be doubted, and has been fully recognised as in practical operation in that state, in the case of *Runkel* v. *Winemiller*, 4 Har. & McHen. 448. That case came before the court on a motion to show cause why a writ of *mandamus* should not issue, commanding the defendants to restore the Rev. William Runkel into the place and functions of minister of a certain congregation. The court entertained the motion, and afterwards issued a peremptory *mandamus*. And in the opinion delivered by the

court on the motion, reference is made to the English doctrine on the subject of *mandamus;* and the court say, that it is a prerogative writ, and grantable when the public justice of the state is concerned, and commands the execution of an act, where otherwise justice would be obstructed. 3 Bac. Abr. 527. It is denominated a prerogative writ, because the king being the fountain of justice, it is interposed by his authority, transferred to the court of king's bench, to prevent disorder from a failure of justice where the law has established no specific remedy, and where in justice and good government there ought to be one. 3 Burr. 1267. It is a writ of right, and lies, where there is a right to execute an office, perform a service, or exercise a franchise; and a person is kept out of possession, and dispossessed of such right, and has no other specific legal remedy. 3 Burr. 1266. These, and other cases where a *mandamus* has been considered in England as a fit and appropriate remedy, are referred to by the general court; and it is then added, that the position that this court is invested with similar powers, is generally admitted, and the decisions have invariably conformed to it; from whence, say the court, the inference is plainly deducible, that this court may, and of right ought, for the sake of justice, to interpose in a summary way, to supply a remedy; where, for the want of a specific one, there would otherwise be a failure of justice.

The theory of the British government, and of the common law, is, that the writ of *mandamus* is a prerogative writ, and is sometimes called one of the flowers of the crown, and is, therefore, confided only to the king's bench; where the king, at one period of *the judicial history of that country, is said to have sat in person, and is presumed still to [*621 sit. And the power to issue this writ is given to the king's bench only, as having the general surviving power over all inferior jurisdictions and officers, and is co-extensive with judicial sovereignty. And the same theory prevails in our state governments, where the common law is adopted, and governs in the administration of justice; and the power of issuing this writ is generally confided to the highest court of original jurisdiction. But it cannot be denied, but this common-law principle may be modified by the legislature, in any manner that may be deemed proper and expedient. No doubt, the British parliament might authorize the court of common pleas to issue this writ; or that the legislature of the states, where this doctrine prevails, might give the power to issue the writ to any judicial tribunal in the state, according to its pleasure; and in some of the states, this power is vested in other judicial tribunals than the highest court of original jurisdiction. This is done in the state of Maryland, subsequent, however, to the 27th of February 1801. There can be no doubt, but that, in the state of Maryland, a writ of *mandamus* might be issued to an executive officer, commanding him to perform a ministerial act required of him by law; and if it would lie in that state, there can be no good reason, why it should not lie in this district, in analogous cases. But the writ of *mandamus*, as it is used in the courts of the United States, other than the circuit court of this district, cannot, in any just sense, be said to be a prerogative writ, according to tthe principles of the common law.

The common law has not been adopted by the United States, as a system, in the states generally, as has been done with respect to this district. To consider the writ of *mandamus* in use here, as it is in England, the issu-

ing of it should be confined to this court, as it is there to the king's bench. But, under the constitution, the power to issue this as an original writ, in the general sense of the common law, cannot be given to this court, according to the decision in *Marbury* v. *Madison*. Under the judiciary act, the power to issue this writ, and the purposes for which it may be issued, in the courts of the United States, other than in this district, is given by the 14th section of the act, under the general delegation of power "to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the *principles and usages of law." And it is under this power, that this court issues the writ to the circuit courts, to compel them to proceed to a final judgment or decree in a cause, in order that we may exercise the jurisdiction of review given by the law; and the same power is exercised by the circuit courts over the district courts, where a writ of error or appeal lies to the circuit court. But this power is not exercised, as in England, by the king's bench, as having a general supervising power over inferior courts; but only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed. The *mandamus* does not direct the inferior court how to proceed, but only that it must proceed, according to its own judgment, to a final determination; otherwise, it cannot be reviewed in the appellate court. So that it is in a special, modified manner, in which the writ of *mandamus* is to be used in this court, and in the circuit courts in the states; and does not stand on the same footing, as in this district, under the general adoption of the laws of Maryland, which included the common law, as altered or modified on the 27th February 1801.

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Thus far the power of the circuit court to issue the writ of *mandamus* has been considered as derived under the first section of the act of 27th February 1801. But the third and fifth sections are to be taken into consideration, in deciding this question. The third section, so far as it relates to the present inquiry, declares, "that there shall be a court in this district, which shall be called the circuit court of the district of Columbia; and the said court, and the judges thereof, shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States." And the fifth section declares, "that the said court shall have cognisance of all cases, in law and equity, between parties, both or either of which shall be resident or be found within the district."

Some criticisms have been made at the bar, between the use of the terms power and cognisance, as employed in those sections. It is not perceived how such distinction, if any exists, can affect the construction of this law. That there is a distinction, in some respects, cannot be doubted; and, generally speaking, the word power is used in reference to the means employed in carrying jurisdiction into execution. But it may well be doubted, whether any marked distinction is observed and kept up in our laws; so as in any measure to affect the construction of those laws. Power must include jurisdiction, which is generally used in reference to the exercise of *that power in courts of justice. But power, as used in the constitution, would seem to embrace both. Thus, all legislative power shall be vested in congress. The executive power shall be vested in a president. The judicial power shall be vested in one supreme court, and in such inferior courts as congress shall, from time to time, ordain and establish: and this

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judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c. This power must certainly embrace jurisdiction, so far as that term is applicable to the exercise of legislative or executive power. And as relates to judicial power, the term jurisdiction is not used, until the distribution of those powers among the several courts, is pointed out and defined.

There is no such distinction in the two sections of the law, in the use of the terms power and jurisdiction, as to make it necessary to consider them separately. If there is any distinction, the two sections, when taken together, embrace them both. The third gives the power, and the fifth gives the jurisdiction on the cases in which that power is to be exercised. By the fifth section, the court has cognisance of all actions or suits of a civil nature, at common law or in equity, in which the United States shall be plaintiffs or complainants; and also of all cases in law and equity, between parties, both or either of which shall be resident or be found within the district. This latter limitation can only affect the exercise of the jurisdiction, and cannot limit the subject-matter thereof. No court can, in the ordinary administration of justice, in common-law proceedings, exercise jurisdiction over a party, unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process. Such process cannot reach the party beyond the territorial jurisdiction of the court. And besides, this is a personal privilege which may be waived by appearance; and if advantage is to be taken of it, it must be by plea or some other mode, at an early stage in the cause. No such objection appears to have been made to the jurisdiction of the court in the present case. There was no want of jurisdiction, then, as to the person; and as to the subject-matter of jurisdiction, it extends, according to the language of the act of congress, to all cases in law and equity. This, of course, means cases of judicial cognisance. That proceedings on an application to a court of justice for a *mandamus*, are judicial proceedings, cannot admit of *a doubt; and that this is a case in law, is equally clear. It is the prosecution of a suit to enforce [*624
a right secured by a special act of congress, requiring of the postmaster-general the performance of a precise, definite and specific act, plainly enjoined by the law. It cannot be denied, but that congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well-organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist. And if the remedy cannot be applied by the circuit court of this district, it exists nowhere. But, by the express terms of this act, the jurisdiction of this circuit court extends to all cases in law, &c. No more general language could have been used. An attempt at specification would have weakened the force and extent of the general words—all cases. Here, then, is the delegation to this circuit court, of the whole judicial power in this district, and in the very language of the constitution; which declares that the judicial power shall extend to all cases in law and equity, arising under the laws of the United States, &c.; and supplies what was said by this court in the cases of *McIntire* v. *Wood*, and in *McClung* v. *Silliman*, to be wanting, viz: That the whole judicial power had not been

delegated to the circuit courts in the states: and which is expressed in the strong language of the court, that the idea never presented itself to any one that it was not within the scope of the judicial powers of the United States, although not vested by law in the courts of the general government.

And the power in the court below to exercise this jurisdiction, we think, results irresistibly from the third section of the act of the 27th of February 1801, which declares that the said court, and the judges thereof, shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States. The question here is, what circuit courts are referred to. By the act of the 13th of February 1801, the circuit courts established under the judiciary act of 1789 were abolished; and no other circuit courts were in existence, except those established by the act of 13th of February 1801. It was admitted by the attorney-general, on the argument, that if the language of the law had been, all the powers now vested in the circuit courts, &c., reference would have been made to the act of the 13th of February 1801, and the courts thereby established. We think that would not have varied the construction of the act. *The reference
*625] is to the powers by law vested in the circuit courts. The question necessarily arises, what law? The question admits of no other answer, than that it must be some existing law, by which powers are vested, and not a law which had been repealed. And there was no other law in force, vesting powers in circuit courts, except the law of the 13th of February 1801. And the repeal of this law, fifteen months afterwards, and after the court in this district had been organized and gone into operation, under the act of the 27th of February 1801, could not in any manner, affect that law, any further than was provided by the repealing act. To what law was the circuit court of this district to look for the powers vested in the circuit courts of the United States, by which the court was to be governed, during the time the act of the 13th of February was in force? Certainly, to none other than that act. And whether the time was longer or shorter before that law was repealed, could make no difference.

It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes; and this has been the course of legislation by congress in many instances where state practice and state process has been adopted. And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption; no other rule would furnish any certainty as to what was the law; and would be adopting prospectively, all changes that might be made in the law. And this has been the light in which this court has viewed such legislation. In the case of *Jathcart* v. *Robinson*, 5 Pet. 280, the court, in speaking of the adoption of certain English statutes, say, by adopting them, they become our own as entirely as if they had been enacted by the legislature. We are then to construe this third section of the act of 27th of February 1801, as if the 11th section of the act of 13th of February 1801, had been incorporated at full length; and by this section, it is declared, that the circuit court shall have cognisance of all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority; which are the very words of the constitution, and

which is, of course, a delegation of the whole judicial power, in cases arising under the constitution and laws, &c.; which meets and supplies the precise want of delegation of power which prevented the exercise *of jurisdiction in the cases of *McIntire* v. *Wood*, and *McClung* v. *Silliman*; and must, on the principles which governed the decision of the court in those cases be sufficient to vest the power in the circuit court of this district. [*626

The judgment of the court below is accordingly affirmed, with costs, and the cause remanded for further proceedings.

TANEY, Ch. J. (*Dissenting.*)—As this case has attracted some share of the public attention, and a diversity of opinion exists on the bench; it is proper that I should state the grounds upon which I dissent from the judgment pronounced by the court. There is no controversy about the facts; and as they have been already sufficiently stated, I need not repeat them.

Upon some of the points much argued at the bar, there is no difference of opinion in the court. Indeed, I can hardly understand, how so many grave questions of constitutional power have been introduced into the discussion of a case like this, and so earnestly debated on both sides. The office of postmaster-general is not created by the constitution; nor are its powers or duties marked out by that instrument. The office was created by act of congress; and wherever congress creates such an office as that of postmaster-general, by law, it may, unquestionably, by law, limit its powers and regulate its proceedings; and may subject it to any supervision or control, executive or judicial, which the wisdom of the legislature may deem right. There can, therefore, be no question about the constitutional powers of the executive or judiciary, in this case. The controversy depends simply upon the construction of an act of congress. The circuit court for the district of Columbia was organized by the act of February 27th, 1801, which defines its powers and jurisdiction; and if that law, by its true construction, confers upon the court the power it has in this instance exercised, then the judgment must be affirmed.

There is another point on which there is no difference of opinion in the court. We all agree, that by the act of July 2d, 1836, it was the duty of the postmaster-general to credit Stockton & Stokes with the amount awarded by the solicitor of the treasury; that no discretionary power in relation to the award, was given to the postmaster-general; and that the duty enjoined upon him was merely ministerial.

*These principles being agreed on, it follows, that this was a proper case for a *mandamus*; provided congress have conferred on the circuit court for the district of Columbia, the prerogative jurisdiction and powers exercised by the court of king's bench, in England; for Stockton & Stokes are entitled to have the credit entered in the manner directed by the act of congress, and they have no other specific means provided by law, for compelling the performance of this duty. In such a case, the court of king's bench, in England, would undoubtedly issue the writ of *mandamus* to such an officer, commanding him to enter the credit. Have congress conferred similar jurisdiction and powers upon the circuit court for this district? This is the only question in the case. The majority of my brethren think that this jurisdiction and power has been conferred; and they have given their [*627

reasons for their opinion. I, with two of my brethren, think otherwise; and with the utmost respect for the opinion of the majority of this court, I proceed to show the grounds on which I dissent from their judgment.

It has been decided in this court, that the circuit courts of the United States, out of this district, have not the power to issue the writ of *mandamus* to an officer of the general government, commanding him to do a ministerial act. The question has been twice before the supreme court; and upon both occasions, was fully argued and deliberately considered. The first case was that of *McIntyre* v. *Wood*, 7 Cranch 504, decided in 1813. It was again brought up in 1821, in the case of *Mc Clung* v. *Silliman*, 6 Wheat. 598, when the former decision was re-examined and affirmed. And it is worthy of remark, that although the decision first mentioned was made twenty-five years ago, yet congress have not altered the law, nor enlarged the jurisdiction of the circuit courts in this respect; thereby showing, that it has not been deemed advisable by the legislature, to confer upon them the jurisdiction over the officers of the general government, which is claimed by the circuit court for this district.

As no reason of policy or public convenience can be assigned for giving to the circuit court here, a jurisdiction on this subject, which has been denied to the other circuit courts; those who maintain that it has been given, ought to show us words which distinctly give it, or from which it can plainly be inferred. When congress intended to confer this jurisdiction on the supreme court, by the act of 1789, ch. 20, they used language which nobody could misunderstand. In that law they declared, that the supreme *628] court should have power *to issue "writs of *mandamus*, in cases warranted by the principles and usages of law to any courts appointed, or persons holding office, under the authority of the United States." Here are plain words. But no such words of grant are to be found in the act of February 27th, 1801, which established the circuit court of the district of Columbia, and defined its powers and jurisdiction. Indeed, those who insist that the power is given, seem to have much difficulty in fixing upon the particular clauses of the law which confers it. Sometimes, it is said to be derived from one section of the act; and then from another. At one time, it is said to be found in the first section; at another, in the third section, and then, in the fifth section; and sometimes, it is said to be equally discoverable in all of them. The power is certainly nowhere given in direct and positive terms; and the difficulty in pointing out the particular clause from which the power is plainly to be inferred, is strong proof that congress never intended to confer it. For if the legislature wished to vest this power in the circuit court for this district, while they denied it to the circuit courts sitting in the states, we can hardly believe, that dark and ambiguous language would have been selected to convey their meaning; words would have been found in the law, equally plain with those above quoted, which conferred the power on the supreme court. But let us examine the sections which are supposed to give this power to this circuit court.

1. It is said to be given by the first section. This section declares, that the laws of Maryland, as they then existed, should be in force in that part of the district ceded by Maryland; and the laws of Virginia, in that part of the district ceded by Virginia. By this section, the common law, in civil and criminal cases, as it existed in Maryland, at the date of this act of con

gress (February 27th, 1801), became the law of the district on the Maryland side of the Potomac; and it is argued, that this circuit court being a court of general jurisdiction in cases at common law, and the highest court of original jurisdiction in the district, the right to issue the writ of *mandamus* is incident to its common-law powers, as a part of the laws of Maryland; and distinguishes it in this respect from the circuit courts for the states.

The argument is founded in a mistake as to the nature and character of the writ of *mandamus*, as known to the English law, and as *used and practised in Maryland at the date of the act of congress in question. [*629 The power to issue the writ of *mandamus* to an officer of the government, commanding him to do a ministerial act, does not, by the common law of England, or by the laws of Maryland, as they existed at the time of the cession, belong to any court whose jurisdiction was limited to a particular section of country, and was not co-extensive with the sovereignty which established the court. It may, without doubt, be conferred on such courts by statute, as was done in Maryland, in 1806, after the cession of the district. But by the principles of the common law and the laws of Maryland, as they existed at the time of the cession, no court had a right to issue the prerogative writ of *mandamus*, unless it was a court in which the judicial sovereignty was supposed to reside; and which exercised a general superintendence over the inferior tribunals and persons throughout the nation or state.

In England, this writ can be issued by the king's bench only. It cannot be issued by the court of common pleas, or any other court known to the English law, except the court of king's bench. And the peculiar character and constitution of that court, from which it derives this high power, are so well-known and familiar to every lawyer, that it is scarcely necessary to cite authorities on the subject. Its peculiar powers are clearly stated in 3 Bl. Com. 42, in the following words: "The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition," &c. It is from this "high and transcendent" jurisdiction, that the court of king's bench derives the power to issue the writ of *mandamus*, as appears from the same volume of Blackstone's Commentaries, p. 110. "The writ of *mandamus*," says the learned commentator, "is, in general, a command issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or *at least supposes, to be consonant to right and justice. [*630 It is a high prerogative writ, of a most extensively remedial nature." And Mr. Justice BULLER, in his introduction to the law relative to trials at *nisi pruis*, also places the right to issue this writ upon the peculiar and high powers of the court of king's bench. In page 195, he says: "The writ of *mandamus* is a prerogative writ, issuing out of the court of king's bench (as that court has a general superintendency

over all inferior jurisdictions and persons), and is the proper remedy to enforce obedience to acts of parliament, and to the king's charter, and in such a case, is demandable of right." Indeed, in all of the authorities it is uniformly called a "prerogative writ," in order to distinguish it from the ordinary process which belongs to courts of justice; and it was not originally considered as a judicial proceeding, but was exercised as a prerogative power. In the case of *Audley* v. *Jay*, Poph. 176, DODERIDGE, Justice, said: "This court hath power not only in judicial things, but also in some things which are extra-judicial. The maior and comminalty of Coventry displaced one of the aldermen and he was restored; and this thing is peculiar to this court, and is one of the flowers of it."

These peculiar powers were possessed by the court of king's bench; because the king originally sat there in person, and aided in the administration of justice. According to the theory of the English constitution, the king is the fountain of justice, and where the laws did not afford a remedy, and enable the individual to obtain his right, by the regular forms of judicial proceedings, the prerogative powers of the sovereign were brought in aid of the ordinary judicial powers of the court, and the *mandamus* was issued in his name to enforce the execution of the law. And although the king has long since ceased to sit there in person, yet the sovereign is still there in construction of law, so far as to enable the court to exercise its prerogative powers in his name; and hence its powers to issue the writ of *mandamus*, the nature of which Justice DODERIDGE so forcibly describes, by calling it extra-judicial, and one of the flowers of the king's bench. It is, therefore, evident, that by the principles of the common law, this power would not be incident to any court which did not possess the general superintending power of the court of king's bench, in which the sovereignty might, by construction of law, be supposed to sit, and to exert there its prerogative powers, in aid of the court, in order that a right might not be without a remedy.

The English common law was adopted in the colony of Maryland, *and the courts of the province formed on the same principles. The proprietary government established what was called the provincial court; in which, it appears, that, in imitation of what had been done in England, the lord proprietary, in an early period of the colony, sat in person.(*a*) This court possessed the same powers in the province that belonged to the court of king's bench in England. Its jurisdiction was co-extensive with the dominions of the lord proprietary; and it exercised a general superintendence over all inferior tribunals and persons in the province; and consequently, possessed the exclusive power of issuing the writ of *mandamus*. When the revolution of 1776 took place, the same system of jurisprudence was adopted; and the 56th article of the constitution of Maryland provided, "that three persons of integrity and sound judgment in the law, be appointed judges of the court now called the provincial court, and that the same court be hereafter called and known by the name of the

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(*a*) I derive my knowledge of the fact that the Lord Proprietary sat in person in the provincial court, from a manuscript work of much value, by J. V. L. McMahon, Esquire; whose History of Maryland, from its first colonization to the revolution, is well known to the public.

general court." No further description of the jurisdiction and powers of the general court is given. It, therefore, in the new order of things, was clothed with the same powers and jurisdiction that had belonged to the provincial court, before the revolution. In other words, the general court was, in the state of Maryland, precisely what the court of king's bench was in England. Afterwards, and before the cession of the district of Columbia to the United States, county courts were established in Maryland, corresponding in character with what are called circuits courts in most of the states. These courts possessed general jurisdiction, civil and criminal, in the respective counties, subject, however, to the superintending power of the general court; which exercised over them the same sort of jurisdiction which the court of king's bench exercises over inferior tribunals. This was the system of jurisprudence in Maryland, at the time when the act of congress adopted the laws of the state for the district; and the power which the Maryland courts then possessed, by virtue of those laws, in relation to the writ of *mandamus*, are set forth in the case of *Runkel* v. *Winemiller*, 4 Har. & McHen. 449. Chief Justice CHASE, in delivering the opinion of the court in that case, after describing the character and principles of the writ of *mandamus*, says:—"The court *of king's bench having a superintending power over inferior court of jurisdiction, may, and of right [*632 ought to, interfere to supply a remedy, when the ordinary forms of proceeding are inadequate to the attainment of justice in matters of public concern. 3 Bac. Abr. 529–30. The position that this court is invested with similar powers, is generally admitted, and the decisions have invariably conformed to it; from whence the inference is plainly deducible, that this court may, and of right ought, for the sake of justice, to interpose in a summary way, to supply a remedy, where, for the want of a specific one, the would otherwise be a failure of justice." This case was decided in 1799, in the general court; and it shows, most evidently, that the power of issuing the writ of *mandamus*, was confined to that court, and was derived from its king's bench powers of superintending inferior courts and jurisdictions in the execution of the law; and that this power was not possessed by any other court known to the laws of Maryland. And so well and clearly was this understood to be the law of the state, that when the general court was afterwards abolished, by an alteration in the constitution, and county courts established as the highest courts of original jurisdiction, no one supposed that the prerogative powers of the general court were incidental to their general jurisdiction over cases at common law; and a statute was passed in 1806, to confer this jurisdiction upon them. This act declares, "that the county courts shall have, use and exercise, in their respective counties, all and singular the powers, authorities and jurisdictions which the general courts, at the time of the abolition thereof, might or could have exercised in cases of writs of *mandamus*. The adoption of the laws of Maryland, therefore, does not give to the circuit court for the district of Columbia, the power to issue the writ of *mandamus*, as an incident to its general jurisdiction over cases at common law. It has none of what Blackstone calls "the high and transcendent jurisdiction" of the court of king's bench in England, and of the general court in Maryland. It is not superior to all the other courts of the United States of original jurisdiction throughout the Union; it is not authorized to superintend them, and "keep them within the bounds

of their authority;" it does not "superintend all civil incorporations" established by the United States; nor "command magistrates," and other officers of the United States, in every quarter of the country, "to do what their duty requires, in every case where there is no other specific remedy." Its jurisdiction is confined to the narrow limits of the district; and the
*633] *jurisdiction which it derives from the adoption of the laws of Maryland, must be measured by that of the county courts of the state, which the court for this district in every respect resembles. These courts had no power to issue the writ of *mandamus*, at the time when the laws of Maryland were adopted by congress; and when the county courts afterwards became, by the abolition of the general court, the highest courts of original jurisdiction, still, by the laws of that state, they could not issue this writ, until the power to do so was conferred on them by statute. As this act of assembly passed five years after congress assumed jurisdiction over the district, it forms no part of the laws adopted by the act of congress. I cannot, therefore, see any ground whatever for deriving the authority to issue this writ of *mandamus* from the first section of the act of congress, adopting the laws of Maryland as they then existed.

2. But it is insisted, that if the power to issue the writs of *mandamus* is not incidentally granted to this circuit court, by the first section of the act of February 27th, 1831, which adopts the laws of Maryland; yet it is directly and positively given by the fifth section, which declares that the court shall have cognisance of "all cases in law and equity." It is said, that a case proper for a *mandamus* is a case at law; and that the words above mentioned, therefore, authorize the circuit court to take cognisance of it. The cases of *McIntire* v. *Wood*, and *McClung* v. *Silliman*, hereinbefore mentioned, appear to me to be decisive against this proposition. These cases decided, that the circuit courts, out of this district, have not the power now in question. It is true, that the 11th section of the act of 1789, ch. 20, which prescribes the jurisdiction of the circuit courts out of this district, does not use the very same words that are used in the fifth section of the act now under consideration. The 11th section of the act of 1789 declares, that the circuit courts shall have cognisance of "all suits of a civil nature, at common law or in equity," &c. But these words, "all suits of a civil nature at common law," mean the same thing as the words "all cases at law," which are used in the act of February 27th, 1801, and Mr. Justice Story, in his Commentaries on the Constitution, § 608–9, in commenting on the meaning of the words, "cases at law and equity," as used in the constitution, says: "A case, then, in the sense of this clause of the constitution, arises, where some subject touching the constitution, laws or treaties of the United States, is submitted to the courts, by a party who asserts his rights in the
*634] *form prescribed by law. In other words, a case is a suit in law or equity, instituted acording to the regular course of judicial proceedings; and when it involves any question arising under the constitution, laws or treaties of the United States, it is within the judicial power confided to the Union." Now, if a case at law means the same thing as a suit at law, and the latter words do not give jurisdiction to the circuit courts, out of this district, to issue the writ of *mandamus* to an officer of the general government, how can words, which are admitted to mean the same thing, give the power to the circuit court within this district? How can the cognisance

of "cases at law," in the act of congress before us, be construed to confer this jurisdiction; when it has been settled by two decisions of this court, that words of the same meaning do not give it to the other circuit courts? We cannot give this construction to the act of February 27th, 1801, without giving a judgment inconsistent with the decisions of this court in the two cases above mentioned; and I cannot agree, either to overrule these cases, or to give a judgment inconsistent with them.

3. But it is argued, that if the 1st section of the act of congress does not give the circuit court this jurisdiction, and if the 5th section does not give it, yet it may be derived from these two sections taken together. The argument, I understand, is this: the general court of Maryland possessed the power to issue the writ of *mandamus*, in a case of this description; and inasmuch as that court possesses this power, the cases which authorized the parties to demand it were "cases at law," by the laws of that state; and consequently, the jurisdiction is conferred on the circuit court, in similar cases, by the adoption of the laws of Maryland in the first section, and the words in the fifth, which give the circuit court cognisance of "cases at law." The fallacy of this argument consists in assuming that the general court of Maryland had jurisdiction to issue the writ of *mandamus*, because it was "a case at law," whenever the party took the proper steps to show himself entitled it. The reverse of this proposition is the true one. A "case at law," as I have already shown, means the same thing as a "suit;" and the general court had authority to issue the writ of *mandamus*, not because the proceeding was a case or suit at law, but because no case or suit at law would afford a remedy to the party. This is the basis upon which rests the power of the court of king's bench in England, and upon which rested the power of the general court in Maryland, before that court was abolished. *These courts, by virtue of their prerogative powers, interposed, "to supply a remedy in a summary way," where no suit or action known to the law would afford one to the party for the wrong he had sustained. It is not a suit, in form or substance, and never has been so considered in England or in Maryland. For if it had been considered in Maryland as a suit at law, Chief Justice Chase, in the case of *Runkel* v. *Winemiller*, hereinbefore referred to, would hardly have put his decision on the prerogative powers of the general court, in the manner hereinbefore stated. Since the statute of the 9th of Anne, authorizing pleadings in proceedings by *mandamus*, it has been held, that such a proceeding is in the nature of an action; and that a writ of error will lie upon the judgment of the court awarding a peremptory *mandamus*; but it never has been said in any book of authority, that this prerogative process is "an action," or "a suit," or "a case," at law; and never suggested, that any court, not clothed with the prerogative powers of the king's bench, could issue the process, according to the principles of the common law, unless the power to do so had been conferred by statute. [*635

4. But it is said, that if the jurisdiction exercised in this case by the circuit court for the district of Columbia, cannot be maintained upon any of the grounds hereinbefore examined, it may yet be supported on the 3d section of the act of February 27th, 1801. This section, among other things, provides, that this circuit "court and the judges thereof shall have all the powers by law vested in the circuit courts, and the judges of the circuit

courts of the United States." And it is insisted, that as the act of February 13th, 1801, was, at that time, in force, the powers of this circuit court are to be measured by that act, although it has since been repealed; that the circuit courts established by the act of February 13th, 1801, did possess the power in question, and consequently, that the circuit court for this district now possesses it, and may lawfully exercise it. There are two answers to this argument, either of which are, in my judgment, sufficient.

In the first place, there are no words in the act of February 27th, 1801, which refer particularly to the powers given to the circuit courts by the act of February 13th, 1801, as the rule by which the powers of the circuit court for this district are to be measured. The obvious meaning of the words above quoted is, that the powers of this circuit court shall be regulated by the existing powers of this circuit courts, as generally established, so that
*636] the powers of this circuit *court would be enlarged or diminished, from time to time, as congress might enlarge or diminish the powers of the circuit courts, in its general system. And when the law of February 13th, 1801, was afterwards repealed, and the act of 1789 re-enacted, the powers of this circuit court were regulated by the powers conferred on the circuit courts by the last-mentioned law. It was the intention of congress to establish uniformity in this respect; and they have used language, which, in my opinion, makes that intention evident. The circuit court for this district cannot, therefore, refer for its "powers" to the act of February 13th, 1801, since that act has been repealed.

In the second place, if the powers of the circuit court for the district of Columbia are still to be regulated by the law which was repealed as long ago as 1802; yet it will make no difference in the result of the argument. Much has been said about the meaning of the words "powers" and "cognisance" as used in these acts of congress. These words are, no doubt, generally used in reference to courts of justice, as meaning the same thing; and I have frequently so used them, in expressing my opinion in this case. But it is manifest, that they are not so used in the acts of congress establishing the judicial system of the United States; and that the word *powers* is employed to denote the process, the means, the modes of proceeding, which the courts are authorized to use in exercising their jurisdiction in the cases specially enumerated in the law as committed to their "cognisance." Thus, in the act of 1789, ch. 20, the 11th section specifically enumerates the cases, or subject-matter, of which the circuit courts shall have "cognisance;" and subsequent sections, under the name of "powers," describe the process, the means which the courts may employ in exercising their jurisdiction in the cases specified. For example, § 14 gives them the "power" to issue the writs "necessary for the exercise of their respective jurisdictions;" and names particularly some of the writs which they shall have the "power" to issue; § 15 gives them the "power" to compel parties to produce their books, &c.; § 17 gives them the "power" to grant new trials, to administer oaths, to punish contempts, and to establish rules of court. The same distinction between "powers" and jurisdiction or "cognisance" is preserved in the act of February 13th, 1801. The 10th section of this act gives the circuit courts thereby established, all the "powers" before vested in the circuit courts of
*637] the United States, unless where otherwise provided by that law; and the next following section (the 11th) enumerates specifically the *cases

or controversies of which they shall have "cognisance." And so also, in the act of February 27th, 1801, establishing the circuit court for this district, the same distinction is continued; and the 3d section (the one now under consideration) gives the court "all the powers by law vested in the circuit courts;" while the 5th section enumerates particularly the matters and controversies of which it shall have cognisance;" that is to say, over which it shall exercise jurisdiction, by the means and the "powers" given to it for that purpose, by this same act of congress. With these several laws before us, in each of which the same terms have evidently been always used in the same sense, it appears to me impossible to doubt the meaning which congress intended to affix to them. If they had used the word "powers" and the word "cognisance," as meaning the same thing; would they, in the 10th section of the act of February 13th, 1801, have given jurisdiction in general terms, under the name of "powers," to the courts thereby established; and then have immediately followed it up with a specification of the cases of which it should take "cognisance:" and if such an unusual mode of legislation had been adopted in this law, from inadvertence or mistake, would it have been adhered to and repeated in the act of February 27th, 1801? It is hardly respectful to the legislative body, for this court to say so. It is clear, that the word "powers" must have been constantly used in these laws, in the sense I have already stated; and if the third section of the last-mentioned act is to be construed as referring particularly to the act of February 13th, 1801, it will not affect the present controversy. For we find the "powers" of those circuit courts given by the 10th section; and they are there given by referring, as generally, to the "powers" conferred on the circuit courts by preceding laws; so that after all, we are still carried back to the act of 1789, in order to learn the powers of the circuit courts established by the act of February 13th, 1801; and consequently, we are also to learn from that law, the "powers" of the circuit court for this district. And upon turning to the act of 1789, we find there the power given to the supreme court to issue the writ of *mandamus* "to persons holding office under the authority of the United States;" but we find no such power given to the circuit courts. On the contrary, it has been decided, as hereinbefore stated, under the act of 1789, they are not authorized to issue the process in question. The 3d section of the act of February 27th, 1801, will not therefore, sustain the jurisdiction exercised in this case by the circuit court.

*But the principal effort on the part of the relators, in this branch of the argument, is to give to this third section such a construction [*638 as shall confer on this circuit court a jurisdiction co-extensive with that given to the circuits, by the 11th section of the act of February 13th, 1801. In other words, they propose to expound the act of February 27th, as if this section of the act of February 13th was inserted in it. The 11th section of the act referred to, enumerates and specifies particularly the cases of which the circuit courts thereby established had "cognisance;" and the relators insist, that jurisdiction in all the cases mentioned in that section, is also conferred on the circuit court for this district, by reason of the provision in the third section of the act of February 27th, above mentioned. And they contend, that the aforesaid 11th section gave to the circuit courts established by that law, jurisdiction to issue the writ in question; and that the circuit court for this district, therefore, possesses the same jurisdiction, even although

it is not given by the fifth section of the act of establishing it. The object of this argument is, to extend the jurisdiction of this circuit court beyond the limits marked out for it by the fifth section of the act which created it; provided the 11th section of the act of February 13th shall be construed to have given a broader jurisdiction.

Now, it appears to me, that when we find the 11th section of the act of February 13th enumerating and specifying the cases of which the circuit courts out of this district should have "cognisance;" and the fifth section of the act of February 27th, enumerating and specifying the cases of which the circuit court within this district should have "cognisance," if there is found to be any substantial difference in the jurisdictions thus specified and defined in these two laws, the just and natural inference is, that the legislature intended that the jurisdiction of the courts should be different; and that they did not intend to give to the circuit court for this district the same jurisdiction that had been given to the others. This would be the legitimate inference, in comparing any laws establishing different courts; and the conclusion is irresistible in this case, where the two laws were passed within a few days of each other, and both must have been before the legislature at the same time. It would be contrary to the soundest rules for the construction of statutes, in such a case, to enlarge the jurisdiction of this circut court, beyond the limits of the fifth section, by resorting to such general words as those contained in the third; and to words, too, which much more

*639] *appropriately apply to its process, to its modes of proceeding, and to other "powers" of the court; and which certainly have no necesary connection with the cases of which the court is authorized to take "cognisance."

I do not, however, mean to say, that the 11th section of the act of February 13th, conferred on the circuit courts which it established, the power to issue the writ of *mandamus*, in a case like the present one. I think it did not; and that a careful analysis of its provisions would show that it did not; especially, when taken in connection with the provisions of the act of 1789, which had expressly conferred that power on the supreme court. But it is unnecessary to pursue the argument on this point, because no just rule of construction can authorize us to engraft the provisions of this section upon the act of February 27th, so as to give to the circuit court for the district of Columbia a wider jurisdiction than that contemplated by the fifth section of the last-mentioned act.

Upon a view of the whole case, therefore, I cannot find the power which the circuit court have exercised, either in the first section, or the third section, or the fifth section; and it is difficult to believe, that congress meant to have given this high prerogative power in so many places, and yet, in every one of them, have left it, at best, so ambiguous and doubtful. And if we now sanction its exercise, we shall give to the court, by remote inferences and implications, a delicate and important power, which I feel persuaded congress never intended to intrust to its hands.

Nor do I see any reason of policy that should induce this court to infer such an intention on the part of the legislature, where the words of the law evidently do not require it. It must be admitted, that congress have denied this power to the circuit courts out of this district. Why should it be denied to them, and yet be intrusted to the court within this district?

There are officers of the general government in all of the states, who are required, by the laws of the United States, to do acts which are merely ministerial, and in which the private rights of individuals are concerned. There are collectors and other officers of the revenue, who are required to do certain ministerial acts, in giving clearances to vessels, or in admitting them to entry or to registry. There are also registers and receivers of the land-offices, who are, in like manner, required by law to do mere ministerial acts, in which the private rights of individuals are involved. Is there any reason of policy that should *lead us to suppose, that congress would deny the writ of *mandamus* to those who have such rights in the states, [*640 and give it to those who have rights in this district? There would be no equal justice in such legislation; and no good reason of policy or convenience can be assigned for such a distinction.

The case of the *Columbian Insurance Company* v. *Wheelwright*, 7 Wheat. 534, has been relied on, as sanctioning the exercise of the jurisdiction in question, and it is said, that this court, in determining that a writ of error would lie from the decision of the circuit court of this district, awarding a peremptory *mandamus*, have impliedly decided, that the circuit court had jurisdiction to issue the process. I confess, I cannot see the force of this argument. The 8th section of the act of February 27th, 1801, provides, "that any final judgment, order or decree, in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined, and reversed or affirmed, in the supreme courts of the United States, by writ of error or appeal, which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is or shall be provided in the case of writs of error, or judgments or appeals, upon orders or decrees rendered in the circuit courts of the United States." Now, the order for a peremptory *mandamus* in the case cited, as well as in the one now before the court, was certainly "a final judgment" of the circuit court. It decided, that they had jurisdiction to issue the *mandamus*, and that the case before them was a proper one for the exercise of this jurisdiction. Being the "final judgment" of the circuit court, it was liable to be re-examined in this court by writ of error; and to be reversed, if, upon such re-examination, it was found, that the circuit court had committed an error; either in assuming a jurisdiction which did not belong to it, or by mistaking the rights of the parties, if it had jurisdiction to issue the *mandamus*. In the case of *Custiss* v. *Georgetown and Alexandria Turnpike Company*, 6 Cranch 233, the supreme court sustained the writ of error, and reversed the judgment of the circuit court of this district, quashing an inquisition returned to the clerk; and this was done, upon the ground, that the circuit court had exercised a jurisdiction which did not belong to it. There are a multitude of cases where this court have entertained a writ of error, for the purpose of reversing the judgment of the court below, upon the ground that the circuit court had not jurisdiction of the case, for the *want of the proper averments in relation to [*641 the citizenship of the parties.

It is certainly error in a circuit court, to assume a jurisdiction which has not been conferred on it by law. And it would seem to be a strange limitation on the appellate powers of this court, if it were restrained from correcting the judgment of a circuit court, when it committed this error. If

such were the case, then, an error committed by a circuit court, in relation to the legal rights of the parties before it, could not be examined into and corrected in this court, if it happened to be associated with the additional error of having assumed a jurisdiction which the law had not given. Such, I think, cannot be the legitimate construction of the section above quoted. And if the circuit court mistakes its jurisdiction, either in respect to the persons, or the subject-matter, or the process, or the mode of proceeding; their mistake may be corrected here, by a writ of error from its final judgment, or by appeal, in cases of equity or admiralty jurisdiction. And whether the final judgment is pronounced in a summary or other proceeding, if it be in a case in which the circuit court had not jurisdiction, its judgment may be re-examined here, and the error corrected by this court. The decision of this court, therefore, in the case of the *Columbian Insurance Company* v. *Wheelwright*, that a writ of error would lie from the judgment of the circuit court of the district of Columbia, awarding a peremptory *mandamus*, is by no means a decision that the court below had jurisdiction to issue it.

In fine, every view which I have been able to take of this subject, leads me to conclude, that the circuit court had not the power to issue a writ of *mandamus* in the case before us. And although I am ready to acknowledge the respect and confidence which is justly due to the decision of the majority of this court; and am fully sensible of the learning and force with which their judgment is sustained, by the learned judge who delivered the opinion of the court, I must yet, for the reasons above stated, dissent from it. I think, that the circuit court had not by law, the right to issue this *mandamus*, and that the judgment they have given ought to be reversed.

Barbour, Justice. (*Dissenting.*)—In this case, I have no doubt but that congress have the constitutional power togive to the federal judiciary, including the circuit court of this district, authority to issue the writ of *mandamus* to the *postmaster-general, to compel him to perform any ministerial duty devolved on him by law. I have no doubt, that the act which in this case was required to be done by the postmaster-general, is such an one as might properly be enforced by the writ of *mandamus*, if the circuit court of this district had authority by law to issue it. But the question is, whether that court is invested with this authority by law? I am of opinion, that it is not; and I will state the reasons which have brought me to that conclusion.

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It was decided by this court, in the case of *McIntire* v. *Wood*, 7 Cranch 504, upon a certificate of division from the circuit court of Ohio, that that court did not possess the power to issue a writ of *mandamus* to the register of a land-office, commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in the state of Ohio. The principle of this case was approved, and the same point affirmed, in the case of *McClung* v. *Silliman*, 6 Wheat. 598. In the views, then, which I am about to present, I shall set out with the adjudged and admitted proposition, that no other circuit courts of the United States have power to issue the writ of *mandamus*. And then the whole question is resolved into the single inquiry, whether the circuit court of this district has power to do that which all admit the other circuit courts of the United States have not the power to do? It has

been earnestly maintained at the bar, that it has; because, it is said, that it has by law a larger scope of jurisdiction.

To bring this proposition to the test of a close scrutiny, let us compare the precise terms in which the jurisdiction of the circuit courts of the United States is granted, by the judiciary act of 1789, with those which are used in the grant of jurisdiction to the circuit court of this district, by the act of the 27th February 1801. The 11th section of the judiciary act of 1789, so far as it respects this question, is in these words: "That the circuit courts shall have original cognisance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds five hundred dollars; and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state." The fifth section of the act of the 27th February 1801, giving *jurisdiction to the circuit court of this district, so far as respects this [*643 question, is in these words: "That said court shall have cognisance of all cases in law and equity, between parties, both or either of which shall be resident, or shall be found, within the said district; and also of all actions or suits of a civil nature, at common law or in equity, in which the United States shall be plaintiffs or complainants." Having placed these two sections in juxtaposition, for the purpose of comparing them together, I will now proceed to examine the particulars, in which it has been attempted to be maintained, that the grant of jurisdiction to the circuit court of this district, is more extensive than that to the other circuits courts of the United States, so as to enable it to reach this case, which it is admitted the others cannot do.

In the first place, we have been told, that in the grant of jurisdiction to the other circuit courts, by the 11th section of the judiciary act of 1789, the words "concurrent with the courts of the several states," are found; which words are not contained in the fifth section of the act of the 27th February 1801, giving jurisdiction to the circuit court of this district. It is argued, that these words are restrictive in their operation, and limit the jurisdiction of those courts to those cases only, of which the state courts could take cognisance, at the time the judiciary act of 1789 was passed. That as the ordinary jurisdiction of the state courts did not then extend to cases arising under the constitution and laws of the United States, therefore, the jurisdiction of the circuit courts, given by the 11th section of that act, did not extend to those cases, because it was declared to be concurrent, and consequently, only co-extensive.

This position is, in my estimation, wholly indefensible. I think it a proposition capable of the clearest proof, that the insertion of the words "concurrent with the courts of the several states," was not intended to produce, and does not produce, any limitation or restriction whatsoever upon the jurisdiction of the circuit courts of the United States. No such consequence could follow, for this obvious reason, that the state courts could themselves rightfully take cognisance of any question whatever which arose in a case before them, whether growing out of the constitution, laws and treaties of the United States; or, as is said in the 82d number of the Federalist, arising under the laws of Japan. The principle is, as laid down in the

number *of the Federalist just referred to, "that the judiciary power of every government looks beyond its own local or municipal laws, and in civil cases, lays hold of all subjects of litigation, between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." In conformity with this principle, it is said by this court, 1 Wheat. 340, speaking of the state courts: "From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States, the supreme law of the land." And in the same case, after putting cases, illustrative of the proposition, and a course of reasoning upon them, they conclude by saying, "it must, therefore, be conceded, that the constitution not only contemplated, but meant to provide for, cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen, that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognisance of cases arising under the constitution, the laws and treaties of the United States."

From these quotations, it is apparent, that no restriction can have been imposed upon the jurisdiction of the circuit courts of the United States by words which made it concurrent with that of the courts of the states; when it is admitted, that there is no question which can arise before them, in a civil case, which they are not competent, and indeed, bound to decide, according to the laws applicable to the question; whether they be the constitution, laws and treaties of the United States, the laws of Japan, or any other foreign country on the face of the earth.

The same number of the Federalist, already referred to, furnishes the obvious reason why these words were inserted. It is there said, that amongst other questions which had arisen in relation to the constitution, one was, whether the jurisdiction of the federal courts was to be exclusive, or whether the state courts would possess a concurrent jurisdiction. The author reasons upon the subject; quotes the terms in which the judicial power of the United States is vested by the constitution; states that these terms might be construed as importing one or the other of two different significations; and then concludes thus: "The first excludes, the last admits, the concurrent jurisdiction of the state tribunals, and as the first would *amount to an alienation of state power, by implication, the last appears to me the most defensible construction." The reason, then, why these words were inserted in the 11th section of the judiciary act, was to remove the doubt here expressed, to obviate all difficulty upon the question whether the grant of judicial power to the federal courts, without saying more, might not possibly be construed to exclude the jurisdiction of the state courts. Its sole object was, as is sometimes said in the law books, to exclude a conclusion.

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Congress cannot, indeed, confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States, as is said in *Houston* v. *Moore*, 5 Wheat. 27; although it is said in the same case, the state courts may exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts. This, however, is not because they have had, or can have, any por-

tion of the judicial power of the United States, as such, imparted to them; but because, by reason of their original, rightful, judicial power, as state courts, they are competent to decide all questions growing out of all laws which arise before them; and accordingly, the framers of the judiciary act, proceeding on the idea that questions arising under the constitution, laws and treaties of the United States, might and would be presented and decided in the state courts, inserted the 25th section, by which those cases, under certain circumstances, might be brought, by writ of error or appeal, to this court.

The difference in the phraseology of the two sections has been adverted to. It has been said, that the words in the 11th section of the judiciary act of 1789, are, all suits of a civil nature, at common law or in equity; and those in the 5th section of the act of 1801, giving jurisdiction to the circuit court of this district, are "all cases in law and equity." Now, it is impossible to maintain, that there is any difference in legal effect between these two modes of expression. What is a case in law or equity? I give the answer in the language of the late chief justice of this court: "To come within this description, a question must assume a legal form, for forensic litigation and judicial decision." And what is a suit? I give the answer also in the language of the late chief justice, who in 2 Pet. 464, says, in delivering the opinion of the court, "if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit." It is then unquestionably true, that the court, which has jurisdiction over all *suits in law and equity, has as much judicial power by those terms, as a court has, by the terms, all cases in law and [*646 equity. The only difference between the two sections under consideration, in relation to the question before us, consists in the two limitations contained in the 11th section of the judiciary act; the one as to the character of the parties, the other as to the value of the matter in dispute.

When, therefore, we suppose a case, in which the plaintiff and defendant are citizens of different states (the one being a citizen of the state where the suit is brought), and in which the value of the matter in dispute is $500; with these parties, and a subject-matter of this value, all the circuit courts of the United States can take cognisance of it, whether it shall have arisen under the constitution, laws or treaties of the United States, the laws of a state, or of any foreign country, having application to the case. Whenever, therefore, it is said, that those courts cannot take cognisance of cases in law and equity arising under the constitution, laws or treaties of the United States, it is only meant to say, that they cannot do it on account of the character of the questions to be decided, unless the parties and the value of the subject-matter come within the description of the 11th section; but when they do, there cannot by a possible doubt. And this will explain the case of a patentee of an invention, referred to in the argument; to whom a right to institute a suit in the circuit courts, has been given by special legislation. The only effect of that is, that such a patentee can sue in the circuit courts, on account of the character of the case, without regard to the character of the party, as to citizenship, or the value of the matter in dispute; whereas, without such special legislation, he could have sued in the circuit courts, if his character as a party, and the value of the matter in dispute, had brought his case within the description of the 11th section

of the judiciary act. In the case of *McClung* v. *Silliman*, however, this difficulty did not exist; for it is distinctly stated in that case (page 601), that the parties to that controversy were competent to sue under the 11th section, being citizens of different states; and yet this court refers to and adopts the responses which they had given to the question stated in *McIntire* v. *Wood*; which answer was in these words, "that the circuit court did not possess the power to issue the *mandamus* moved for."

It has been attempted to be maintained in the argument, that the circuit court of this district has a more extensive jurisdiction than *the other circuit courts of the United States, by the following course of reasoning: We have been referred to the third section of the act of the 27th of February 1801, establishing the circuit court of this district, which section is in these words, "the said court, and the judges thereof, shall have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States." It is then assumed in the argument, that the powers of the court, and its jurisdiction, are the same thing; it is also assumed, that the third section has reference, not to the powers of the circuit courts of the United States, and their judges, as they shall be, from time to time, modified by legislation, but to those which were established by the act of the 13th of February 1801, entitled "an act to provide for the more convenient organization of the courts of the United States;" which, though since repealed, was passed fourteen days before the act establishing the circuit court of this district, and was in force at the date of the passage of this latter act. We are then referred to the 11th section of the act of the 13th of February 1801, by which jurisdiction is given to the circuit courts thereby established, over "all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority."

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Even conceding, for the present, all these assumptions in favor of the argument, it wholly fails to sustain the position contended for. To prove this, I need only refer to my previous reasoning in this case; by which I have shown, that under the 11th section of the judiciary act of 1789 the circuit courts had as ample jurisdiction, in all cases arising under the constitution, laws and treaties of the United States, as is given them by the section now under consideration; subject only to the two limitations as to parties, and value of the matter in dispute. So that, beyond all question, the only difference is, that by the section now under consideration, the circuit courts could take cognisance on account of the character of the case, no matter who were the parties, or what the value in dispute; whereas, by the 11th section of the judiciary act, they could take cognisance of the same questions, provided the parties were, for example, citizens of different states, and the matter in dispute was of the value of $500. And yet, as I have already stated, in *McClung* v. *Silliman*, in which the parties corresponded to the requirements of the law, and there were no question raised as to the value of the matter in dispute, this court re-affirmed the proposition, *that the circuit courts of the United States did not possess the power to issue the writ of *mandamus*. But let us briefly examine one of the assumptions which I have, *argumenti gratiâ*, conceded, for the purpose of giving the fullest force to the argument founded on it; I mean, that which takes for granted, that the powers and the jurisdiction of the court

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are the same thing. I say nothing of the other assumption, simply because it is wholly immaterial to the view which I take. Are the powers and jurisdiction of the court equivalent? Whatever may be the meaning of these terms, in the abstract, they are clearly used as of essentially different import, in the acts of congress; and this difference will, in my opinion, go far to show the error in the conclusions drawn from the assumption, that they are of equivalent import. There are several reasons which conclusively prove that they were used in different senses by congress. In the first place, as well in the act of 1789, establishing the circuit courts of the United States, and the act of the 13th February 1801, re-organizing them, as in the act of the 27th February 1801, establishing the circuit court of this district, the jurisdiction of the court is defined in one section, and its powers are declared in another. Now, it is an obvious remark, that if powers and jurisdiction were considered as equivalent, here was mere useless tantology. For, upon this hypothesis, the grant of powers carried with it jurisdiction, and *è converso*, the grant of jurisdiction carried with it powers.

In the next place, we not only find, that in some sections, the term cognisance, or jurisdiction (which are synonymous) is used, whilst in others, the term power is made use of; but in the very same section, that is, the 13th, in relation to the supreme court, both terms are used thus: "The supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except," &c.; and in the same section, "and shall have power to issue writs of prohibition to the district courts," &c.

Again, the act of 1789, after defining the jurisdiction of the different courts in different sections, viz., that of the district courts in the 9th, that of the circuit courts, in the 11th, and that of the supreme court, in the 13th, together with the power to issue writs of prohibition and *mandamus;* proceeds, in subsequent sections, to give certain powers to all the courts of the United States. Thus, in the 14th, to issue writs of *scire facias, habeas corpus*, &c.; in the 15th, to require the production of books and writings; in the 17th, to grant new trials, to administer oaths, punish contempts, *&c. It is thus apparent, that congress used the terms, jurisdiction and powers, as being of different import. The sections giving jurisdiction describe the subject-matter, and the parties of which the courts may take cognisance; the sections giving powers, import authority to issue certain writs, and do certain acts incidentally becoming necessary in, and being auxiliary to, the exercise of their jurisdiction. In regard to all the powers in the 15th and 17th sections, this is apparent beyond all doubt, as every power given in both those sections, necessarily pre-supposes that it is to be exercised in a suit actually before them, except the last in the 17th section, and that is clearly an incidental one, it being a power "to make and establish all necessary rules for the orderly conducting business in the said courts," &c. And this brings me directly to the 14th section, under which it was contended, in the case of *McClung* v. *Silliman*, that the circuit courts could issue writs of *mandamus*. That section is in these words: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective juris [*649

diction, and agreeable to the principles and usages of law." As the writ of *mandamus* is not specially provided for by law, except in the case of the supreme court, it is obvious, that to enable any circuit court to issue it, it must be shown to be necessary to the exercise of its jurisdiction. It is argued here, as it was in the case of *McClung* v. *Silliman*, that a *mandamus* is proper, where there is no other specific legal remedy; and that, therefore, in such a case, it is necessary to the exercise of the jurisdiction of the court, and so within the words of the statute. But what was the answer of the court in that case? Amongst other things, they said: "It cannot be denied, that the exercise of this power is necessary to the exercise of jurisdiction in the court below. By why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it." Again, they said: "The 14th section of the act under consideration could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists; and not where it is to be courted, or acquired, by means of the writ proposed to be sued out. Such was the case brought up from Louisiana, in which the judge refused to proceed to judgment, by which act the plaintiff must have lost his remedy below, and this court have been deprived of its appellate control over the question *of right." *650] As this answer was considered conclusive in the case referred to, it would be sufficient for me to stop here, with giving the same answer. But let us pursue the subject a little further. The proposition which I maintain is, that this section did not contemplate any original writ, but only those which are incidental and auxiliary. That it did not contemplate any writ, as original process, is apparent from this consideration; that by an act passed at the same session, and within five days thereafter, entitled an act to regulate processes in the courts of the United States, the forms of writs and executions, except their style and modes of process, then used in the supreme courts of the states, were adopted.

But it seems to me, that there is an argument to be derived from the nature and character of the writ of *mandamus*, and the legislation of congress in relation to it, which is, of itself, decisive against the power of the circuit court to issue it. It is declared by all the English authorities, from which, in general, our legal principles are drawn, to be a high prerogative writ. Accordingly, it issues, in England, only from the king's bench, in which the king did formerly actually sit in person; and in which, in contemplation of law, by his judges, he is still supposed to sit. It never issues but to command the performance of some public duty. Upon this principle (5 Barn. & Ald. 899), the court of king's bench refused a *mandamus* to a private trading corporation, to permit a transfer of stock to be made in their books; declaring that it was confined to cases of a public nature, and that although the company was incorporated by a royal charter, it was a mere private partnership. Upon the same principle, I believe that it may be affirmed, without exception, unless where a statutory provision has been made, that in every state of the Union where the common law prevails, this writ issues only from the court possessing the highest original common law jurisdiction. The congress of the United States adopted the same principle, and by the 13th section of the judiciary act of 1789, gave to the supreme court of the United States, power, in express terms, to issue writs of *mandamus*, "in cases warranted by the principles and usages of law, to

any courts appointed by, or persons holding office under the authority of, the United States," thus covering the whole ground of this high prerogative writ. If, then, there ever was a case in which the maxim that *expressio unius est exclusio alterius*, applied, this seems to me to be emphatically that case. It is of the nature of the writ, to be issued by the highest court of the government; the supreme *court is the highest; and accordingly, to that court the power to issue it is given. It is given in [*651
express words to that court, and is not given in terms to any other court. It is given to that court in express terms, in the 13th section; and although not given in terms in the 14th section, immediately following, the power to issue it is attempted to be derived, by implication, from that section. And last, but not least, where it is given, it is subject to no limitation, but that it is to issue "in cases warranted by the principles and usages of law," and may be issued to any courts appointed by, or persons holding office under the authority of, the United States;" whereas, in the 14th section, all the courts of the United States are empowered to issue certain writs, naming them, and then others, not naming them (and not mentioning the writ of *mandamus*), which may be necessary for the exercise of their respective jurisdictions. Nor is the force of this argument at all weakened by the circumstance that this court, in the case of *Marbury* v. *Madison*, 1 Cranch 137, declared that part of the judiciary act, which empowered the supreme court to issue the writ of *mandamus* to be unconstitutional, so far as it operated as an act of original jurisdiction. Because this case was decided nearly fourteen years after the law was passed, and we must construe the act as if it were all constitutional, because congress certainly so considered it; and we are now inquiring into what was their intention, in its various provisions, which can only be known, by construing the act as a whole, embracing its several parts, of which the power in question was one. But if the other circuit courts of the United States, under the powers given to them, cannot, as has been decided by this court, issue the writ of *mandamus*, then, the circuit court of this district cannot do it, under the powers given to it, because its powers are the same with those of the others. For, by the third section of the act establishing it, it and its judges are declared to have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States; and even supposing that to refer to the powers of the circuit courts, as organized by the act of 1801, that does not vary them; because, by the tenth section of that act, those courts are invested with all the powers heretofore granted by law to the circuit courts of the United States; that is, those by the judiciary act, unless where otherwise provided by that act: and there is no pretence, that there is any power given in that act, which affects this question. If, then, the jurisdiction and the powers of the circuit court of this *district are the same with the jurisdiction and powers of the other circuit courts of the United [*652
States; and if, as has been solemnly decided by this court, that jurisdiction and those powers do not authorize the other circuit courts to issue the writ of *mandamus*, it would seem to follow, as an inevitable consequence, that neither can the circuit court of this district issue that writ.

Finally, it was argued, that if all the other sources of power failed, there is a sufficient one to be found in that section of the act of 1801, establishing the circuit court of this district, by which it is enacted, that the laws of

Maryland, as they now exist, shall be and continue in force in that part of the district which was ceded by that state of the United States, &c. The argument founded upon this section, is in substance this: The laws of Maryland are declared to be in force in this part of the district; the common law of England constitutes a part of those laws; by the common law, in such a case as this, a writ of *mandamus* would lie; therefore, the circuit court of this district can issue a *mandamus* in this case. This part of the argument proceeds upon the principle, that the adoption of the common law, *per se*, authorizes the issuing of the writ. But it must be remembered, that the adoption of the common law here, cannot give any greater power, than the same common law would give to the courts of Maryland, from which state it is adopted. Now, in *McClung* v. *Silliman*, it was decided, that a state court could not issue a *mandamus* to an officer of the United States; consequently, it follows, that no court in Maryland could have issued the writ in this case: and yet, the argument which I am now considering, seeks to maintain the position, that whilst it is conceded, that a Maryland court, with the common law in full force there, could not have issued this writ, the circuit court of this district has the authority to do so, by reason of the adoption of that very law which would not give the authority to do it there.

It does seem to me, that to state this proposition is to refute it. The object of this provision appears to me to have been plainly this: that the citizens of that part of this district, which formerly belonged to Maryland, should, notwithstanding the cession, continue to enjoy the benefit of the same laws to which they had been accustomed; and that, in the administration of justice in their courts, there should be the same rules of decision; thus placing the citizens of this district substantially in the same situation in this respect, as the citizens of the several states; with this difference only; that *whilst in the states there are federal and state courts, in the one or the other of which justice is administered, according to the character of the parties, and other circumstances; in this district, by its judicial organization, the same justice which in the states is administered by the two classes of courts, is here dispensed by the instrumentality of one court, viz., the circuit court of this district. But that, as in the states, the federal circuit court cannot issue the writ of *mandamus*, because the jurisdiction and powers given to them by congress do not authorize it; so here, the circuit court of this district cannot issue it, by virtue of the jurisdiction and powers given to it by congress (exclusively of the adoption of the laws of Maryland); because, exclusively of those laws, its jurisdiction and powers, as I think I have shown, are neither more nor less, in inference to this subject, than those of the other circuit courts of the United States. And as, in the states, the state courts cannot issue it, although the common law is in force there; so the circuit court of this district cannot issue it, although the common law, by the adoption of the laws of Maryland, is in force here; it being, in my opinion, impossible to maintain the proposition, that the adoption of the common law here, can impart a greater authority than it does to the courts of the very state from which it was adopted. The result of that adoption, as it regards this question, may, as it seems to me, be summed up in this one conclusion: That, as in Maryland, the common law is in full force which authorizes the writ of *mandamus*; and yet a Maryland

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court can only issue it to a Maryland officer, and not to an officer of the United States; so here, the same common law, upon the same principles, would authorize the circuit court of this district to issue the writ to an officer of the district of Columbia, the duties of whose office pertained to the local concerns of the district; but not to an officer of the United States.

Under every aspect in which I have viewed the question, I feel a thorough conviction, that the circuit court of this district had not power to issue the writ in question; and, consequently, I am of opinion, that the judgment awarding a peremptory *mandamus*, should be reversed.

CATRON, Justice. (*Dissenting.*)—In this proceeding of the United States against the postmaster-general, at the relation of Stockton, Stokes & Co., I had intended not to intimate that I differed in any respect from the majority, having an aversion to dissenting opinions, save on constitutional questions. But my two brethren, with whom I agree, having determined to do so; it follows, I must express a concurrence with the one side or the other.

On the merits, I think the senate of the United States, and the solicitor of the treasury, construed the special act of congress correctly; and that the solicitor's award is a final adjudication, and conclusive of the rights of the relators.

But the question whether the circuit court of this district had power to compel the postmaster-general, by *mandamus*, to enter a credit for the amount awarded, lies at the foundation of our institutions; a question more grave or important rarely arises. Coercion, by the writ of *mandamus*, of the officers and agents of a government, is one of the highest exertions of sovereignty known to the British constitution and common law; it is truly declared to be one of the flowers of the king's bench (3 Bl. Com. 110, note), and in England, can only be enforced by that court, where the king formerly sat in person, and is now deemed to be potentially present. It is his command, in his own name, directed to a court, person or corporation, to do a particular thing therein specified, which appertains to their office or duty, as a means of compelling its performance. 3 Bl. Com. ch. 7. The proceeding, there, as here, is in the name of the government, and not that of the relators; it stands on the foot of contempt, and is intended to reform official delinquency.

By the act of independence, this prerogative and portion of sovereignty, unimpaired, devolved on the different states of this Union; and by the constitution of the United States, such portion of it as was necessary to coerce the courts, officers and agents of the general government, was withdrawn from the states, and conferred on the federal sovereignty. Here, the power lay dormant, until congress should act. On the legislature was imposed the duty to give it effect; it was wide as the land, and extended to every portion of it; and by the judiciary act of 1789, § 13, congress attempted to invest the supreme court of the United States with the power to issue writs of *mandamus* to persons holding office under the authority of the United States. But the constitution having restricted this court to the exercise of certain original powers, and this not being amongst them; it was holden, in *Marbury* v. *Madison*, 1 Cranch, so much of the act was void. The decision was made in 1803; up to that time, congress and the country did not

question that a law existed, proper and necessary to give effect to the prerogative, through the instrumentality of this court; and that it was properly vested in the highest tribunal in the land, exercising a jurisdiction co-extensive with our whole territory. So the matter stood, when the act of the 27th February 1801, was passed, organizing the circuit court for the district of Columbia. And the question is, did congress, by implication, confer, or intend to confer, this high prerogative, within the ten miles square, on the circuit court? That concurrent power with the supreme court was intended to be given, it is difficult to believe.

The power is claimed by the first, third and fifth sections of the act. The first section adopts, and declares in force, the laws of Maryland, as they then existed on the north side of the Potomac. By the constitution of the United States, the prerogative to coerce by *mandamus* federal officers, had passed from the state of Maryland to the government of the Union. Her laws and courts, in 1801, were denuded of the power; and as it did not remain with the courts of Maryland, so it was not transferred to the circuit court of the district of Columbia. This is deemed settled by *McClung* v. *Silliman*, 6 Wheat. 598.

And substantially, the same answer may be given to the argument which relied on the 11th section of the judiciary act of 1789; providing, that the circuit courts should have original cognisance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity. Take it, that congress did not distinguish between the cognisance of the courts to draw to them controversies to be litigated; and their powers to coerce obedience to judgments or decrees, and to compel the performance of duties where ascertained rights existed; still, the section cited cannot help the relators. Suppose, the circuit court of the district, in 1801, did have conferred on it powers "concurrent" with the courts of Maryland; these having been deprived, on the adoption of the constitution of the United States, of the prerogative to coerce by *mandamus* officers of the United States, the concurrent powers of the circuit court of the district, could rise no higher than those of the Maryland courts. The argument is easily met, by separating the prerogatives and powers passed to the federal government by the constitution, from those reserved to the states.

The third section of the act of 27th February 1801, provides: "And the said court, and the judges thereof, shall have all the *powers* by law vested in the circuit courts, and the judges of the circuit courts of the United States. *Power* to issue the writ of *mandamus* to coerce obedience to a sovereign command, on the petition of a citizen to the sovereignty, is one thing; *jurisdiction* to try a case at law or in equity, is the exercise of a very different authority. The first enforces the performance of an official duty, by an independent writ, against a person not sued, where the relator shows an ascertained right; as in this instance, where the writ is asked to enforce a decree. The second tries and ascertains the right, and establishes it, by a judgment. But to enforce the judgment by process, is the exercise of power; being the means employed to carry the jurisdiction into execution. So, the judiciary act of 1789, and subsequent ones, conferring jurisdiction and powers on the courts of the United States, declare; and so they have been uniformly construed; as the cases of *Marbury* v. *Madison*, 1 Cranch 127; *McIntire* v *Wood*, 7 Ibid. 504; and *McClung* v. *Silliman*, 6 Wheat. 598, distinctly show,

without going further. They treat of the subject before us, and need no collateral aid.

What, then, are the powers to issue writs and coerce the performance of duties, vested in the circuit courts of the United States; referred to and adopted by the third section of the district act of 1801? By the 14th section of the judiciary act of 1789, they are declared to have power to issue writs of *scire facias*, *habeas corpus* and all other writs not specially provided for by statute; which may be necessary for the exercise of their respective jurisdictions, and which are agreeable to the principles and usages of law. The antecedent section having vested in the supreme court the prerogative and power to issue writs of *mandamus* to persons holding office under the authority of the United States; of course, the power was not vested, nor intended to be vested, in the circuit courts, further than might be necessary for the exercise of the jurisdiction conferred by the 11th section; and so it was settled by this court in *McIntire* v. *Wood*.

But it is insisted, the power is derived from the judiciary act of the 13th of February 1801; to which the act of the 27th of February, establishing the circuit court of the district, must also have had reference; and although the act of the 13th of February was repealed, on the coming in of Mr. Jefferson's administration, in March 1802; still, as the district act of the 27th of February was not repealed, the act adopted by it became a part thereof, so far as it was adopted; and within the district of Columbia, the powers and jurisdiction conferred by that of the 13th of February, continued in force, notwithstanding the repeal, in all other parts of the Union.

Suppose, we imply parts of the act of the 13th of February 1801, not to have been repealed within this district; can we found on this implication, the additional one, that the act conferred on the circuit court of the district the high prerogative power to issue writs of *mandamus*, coercing the secretaries, and other officers of the United States, to perform their various duties? Did the power exist in the court of this district in 1803, when the supreme court brought Mr. Madison, the secretary of state, before it? That no department of the government, judicial tribunal, or law-officer of the United States, so apprehended, at that time, or for more than thirty years thereafter, has been abundantly established during the progress of this investigation.

It is admitted, and was so decided in *McIntire* v. *Wood*, that none other of the circuit courts of the United States, holden by the judges of the supreme court, have the power claimed for the court in this district; and that throughout the twenty-six states of the Union, this high prerogative writ cannot be exerted, because congress, since the decision in 1803, in the case of *Marbury* v. *Madison*, has not seen proper to vest it in these inferior tribunals; nor is it matter of surprise, when we recollect, to what extent the executive departments would have been subjected to the judicial power.

Should we, then, by doubtful implication and a strained construction, apply this highest of judicial powers, in its nature broad as the Union, to this ten miles square? That the power can only be maintained to exist by implication, and not by express enactment, is admitted on all hands. It never was attempted to be conferred, in express terms, save on the supreme court; and is the construction that invokes it for the circuit court of this

district, a strained one? The tenth section of the repealed act of the 13th of February 1801, declares, "that the circuit courts then established, shall have, and are hereby invested with, all the powers heretofore granted by law to the circuit courts of the United States, unless otherwise provided by this act." There is no repealing clause to the act. The section quoted refers directly to the 14th section of the act of 1789, for the powers common to all the circuit courts of the Union. They have stood unaltered, and been recognised, with slight exceptions, as the sole powers by which the jurisdiction of the circuit courts has been enforced, from the year 1789 to this time.

It is insisted, however, that the jurisdiction conferred on the circuit court by the 11th section of the repealed act of the 13th of February 1801, is much broader than that given to them by the 11th section of the act of 1789; that the act of 1801 covers the whole ground of the constitution. This is certainly true; but the fifth section of the act of the 27th of February 1801, declaring what matters shall be cognisable in the circuit court for the district of Columbia, confers jurisdiction quite as comprehensive. Its cognisance (or jurisdiction "to hold plea") extends to all crimes and offences, and to *all* cases in law and equity, provided the defendant be found in the district. Thus, as the 11th sections of the act of 1789, and the 13th of February 1801, each have reference to the exercise of jurisdiction, in suits or actions between litigant parties, or over matters in some form brought before the court to try and ascertain a contested right; it would be a most unnatural construction, to hold (as I think), that the phrase, "cognisance of all cases in law and equity," authorized the court to assume the high power of coercing by *mandamus* one of the secretaries, or the postmaster-general, to the performance of some specific public duty, in case of an ascertained right, by force of the strong arm of sovereign power, because he was a public officer; and who was not a suitor in court, or party to a case in law or equity.

What is this proceeding? The relators applied to a tribunal where a portion of sovereignty was supposed to have been vested, stated their ascertained right, and made their complaint, that an ordinary remedy was wanting to enforce the right, and asked the representative of sovereignty for the aid of the writ, and an exertion of its power, in the name of the United States, on one of its great officers, to compel him to do his duty, to prevent a failure of justice. This is the nature of the demand, and the writ awarded for its enforcement. 1 Cranch 168.

In no just sense, can this writ of *mandamus* be deemed a case at law, between the United States and the postmaster-general. It differs in no material feature from a writ of attachment issued by a court against one of its officers, where he refuses to perform an official duty. That it is not "a case" between the relators and the postmaster-general, was decided by this court in *McClung* v. *Silliman*. There, the relator set forth, that he was a citizen of one state, and the register of the land-office in Ohio, of another; and therefore, proper parties were before the court, "who, under the description of person, were entitled to maintain suits in the courts of the United States." To which the court responded, that the application in that instance for the writ of *mandamus*, as in the one referred to of *McIntire* v. *Wood*, 7 Cranch 504, "were wholly uninfluenced by any considerations

drawn from the want of personal attributes of the parties. Holding, in substance, as the undoubted truth is, that the *mandamus* was not a *private* remedy to the relator ; but the exertion, at his request, of a prerogative and attribute of sovereignty, through the instrumentality of a court of justice, for the sake of good government, and to prevent an abuse of its authority by those acting at its command. Taken in this sense, the decision in *Mc Clung* v. *Silliman* is easily understood ; viewed in any other, it is involved in all the confusion attributed to it by the argument and the opinion of the court below.

Another consideration prominently presents itself. Congress has jurisdiction, exclusive of the several states, over this district of ten miles square ; and so congress has exclusive jurisdiction over the territories of the United States ; and upon the courts of these, as upon the courts of this district, the jurisdiction and powers of the state courts, of which the territories were formerly a part, have been conferred ; and, in addition thereto, the territorial courts have been invested with the jurisdiction and powers of the circuit courts of the United States. There are two territories, the courts of which are now exercising such general jurisdiction and powers—Florida and Wisconsin. These courts having co-extensive powers with that of the district of Columbia, it follows, if the sovereign prerogative to exert the writ of *mandamus* to coerce executive officers of the United States, pertains to the one court, it must to the others ; and that congress has, by implication, intrusted to the courts of the two territories named, as well as to the courts of this district, powers that have been unquestionably withholden from the federal circuit courts of the twenty-six states. To say, congress never so intended, and if the power exists, it was conferred by an oversight in the legislature, is perhaps asserting what few would be found to deny. The truth, there can be little room for doubt, is, that congress has been unwilling to expose the action of the government, in the administration of its vast and complicated affairs, and its officers, who have charge of their management, to the danger and indignity of being coerced and controlled, at the ill-defined discretion of the inferior courts, by the writ of *mandamus ;* and that after the decision of *Marbury* v. *Madison*, in 1803, holding that the supreme court had not the power thus to coerce an officer of the United States, it has been permitted to lie dormant, awaiting the action of the legislature. The supposition is rendered highly probable, when we consider the delicacy its exercise would necessarily involve ; and the difficulty of vesting so high and extensive a power in the inferior courts, and especially, in those of this district, in a modified and safe form.

Such being my own opinion, I think, the order awarding the *mandamus* against the postmaster-general should be reversed, for want of jurisdiction in the court below to issue the writ.

Judgment affirmed.

United States, Appellants, *v.* Joseph Delespine's Heirs, Lazarus and others.

Evidence.

A translation by the secretary of the board of land commissioners of Florida, whose duty it was to translate Spanish documents given in evidence before the board of commissioners, of a certified copy of a Spanish grant of land in Florida, which had been produced to the board, was properly admitted as evidence of the grant; satisfactory proof having been given to the court, that the original grant could not be found in the records of East Florida; and that this was the best evidence, from the nature of the case, which could be given of the existence of the original paper, lost or destroyed.

Appeal from the Superior Court of East Florida. The heirs of Joseph Delespine and others, purchasers from Joseph Delespine, filed a petition to the supreme court of East Florida, praying confirmation of a grant to Joseph Delespine, made by Don Jose Coppinger, on the 9th day of April 1817; he being then the Spanish governor of East Florida. The grant was for 43,000 acres, under which surveys were made by George J. F. Clarke, then surveyor of the province, according to the terms of the grant.

The petitioners exhibited, in support of their claim, the original translation, certified by Francis I. Facio, of the certified copy by Thomas de Arguilar, the government secretary of the province, which was brought into court by the keeper of the public archives of East Florida. Evidence was given, that the original grant by Governor Coppinger had not been found among the archives, nor anywhere. It was also in evidence, that a copy of the memorial of Joseph Delespine, and of the concession thereupon, for the 43,000 acres of land, purporting to have been certified by Thomas de Arguilar, as secretary of the government, was exhibited to the board of land claims of East Florida, which was, before the board, proved to have been in the handwriting of the government secretary, and signed by him. This document had been mislaid or lost.

The superior court of East Florida gave a decree in favor of the petitioners; and the United States prosecuted this appeal.

*655] *Butler*, Attorney-General of the United States, informed the court, that on an examination of the record, he found nothing in the case to distinguish it from those which had been already decided in favor of claimants under Spanish grants; unless the court should consider the circumstance of the original grant by Governor Coppinger not having been found in the archives of Florida, as rendering the evidence of the grant insufficient. The grant should have been found filed with similar papers in the proper office, but there it was not. It is admitted, that the papers of the office are in disorder; and evidence was given in the superior court of Florida, which showed that negligence in the preservation of the papers frequently prevailed there. But the certified copy of the grant was not produced, it also had been lost; and the only evidence exhibited to the court, was a certified translation of a copy of the grant.

It is admitted, that when a grant of land is made, the original is retained, and a copy only is furnished to the grantee; but the original is filed in the proper office. There no original can be found. The case must stand before

the court as if the certified copy of the grant had been produced, for its loss is accounted for; but the question which this court have to decide, is, whether the grantees ought not to prove the original to be in existence. Cited, *Mitchel* v. *United States*, 9 Pet. 731; *Owings* v. *Hull*, Ibid. 621.

WAYNE, Justice, delivered the opinion of the court.—In thi scase, it is conceded by the attorney-general, that the only ground upon which it can be taken out of the decision of this court, confirming the decrees of the courts of Florida, upon grants and concessions of land made by the authorities of the king of Spain to his subjects, before the 24th January 1818, was. that the superior court of East Florida, in adjudiciating upon that claim, received as evidence, the copy of a copy of a concession or grant to Joseph Delespine. We think, the copy, in this instance, was properly received by the court. The first copy was made from the original, filed in the proper office, from which the original could not be removed for any purpose; that copy, it is admitted, would have been evidence in the cause. It is shown, by the affidavit of Mr. Drysdale, to have been lost, whilst the claim was under examination by the board of commissioners established by congress for ascertaining land claims in Florida; and that the copy received as evidence, is a translation of *the first, certified by the secretary [*656
of the board of land commissioners, whose duty it was to translate Spanish documents given in evidence before the board of land commissioners; and is a part of the papers in this claim, transferred, according to law, of the keeper of the public archives of East Florida. And it appears also, by proofs in this cause, that the papers in the office from which the first copy was taken, and the original of which is also sufficiently proved to have been on file, have been, by accident or otherwise, mutilated, since the first copy was taken; that the original could no longer be found; and, consequently, that the copy in this case, was the best evidence, from the nature of the case, which could be given of the existence of an original paper lost or destroyed. The decree of the superior court of East Florida is confirmed.

THIS cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it if now here decreed and ordered by this court, that the decree of the said superior court in this cause be and the same is hereby affirmed.

*The State of Rhode Island and Providence Plantations, Complainants, *v.* The Commonwealth of Massachusetts, Defendants.

Original jurisdiction of the supreme court.—Boundaries between states.

The supreme court has jurisdiction of a bill filed by the state of Rhode Island against the state of Massachusetts, to ascertain and establish the northern boundary between the states; that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs; and they be quieted in the enjoyment thereof, and their title; and for other and further relief.[1]

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them.

An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived, by appearance and pleading to issue; but when the objection goes to the power of the court over the parties, or the subject-matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill.

The supreme court is one of limited and special original jurisdiction; its action must be confined to the particular cases, controversies and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is *coram non judice*, and its action a nullity; and whether the want or excess of power is objected by a party, or is apparent to the court, it must surcease its action, or proceed extra-judicially.

The several states of the United States, in their highest sovereign capacity, in the convention of the people thereof, on whom, by the revolution, the prerogative of the crown and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority, adopted the constitution; by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution, it was ordained, that this judicial power, in cases where a state was a party, should be exercised by the supreme court, as one of original jurisdiction; the states waived their exemption from judicial power, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases; but which they would not grant to any inferior tribunal; by this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority, as their agent for executing the judicial power of the United States in the cases specified. Massachusetts has appeared, submitted to the process, in her legislative capacity, and pleaded in bar of the plaintiff's action certain matters on which the judgment of the court is asked; all doubts as to jurisdiction over the parties are thus at rest, as well by the grant of power by the people, as the submission of the legislature to the process; and calling on the court to exercise its jurisdiction on the case presented by the bill, plea and answer.

Although the constitution does not, in terms, extend the judicial power to all controversies between two or more states; yet it, in terms, excludes none, whatever may be their nature or subject.

*658] This court, in construing the constitution as to the grants of powers to the United *States, and the restrictions upon the states, has ever held, that an exception of any particular case, pre-supposes that those which are not excepted, are embraced within the grant or prohibition; and have laid it down as a general rule, that where no exception is made, in terms, none will be made by mere implication or construction.

In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy.

The boundary established and fixed by compact between nations, becomes conclusive upon all the subjects and citizens thereof, and binds their rights; and is to be treated, to all intents

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[1] The supreme court has original jurisdiction under the constitution, of controversies between states of the Union, concerning their boundaries. And this jurisdiction is not defeated, because, in deciding the question of boundary, it is necessary to consider and construe contracts and agreements between the states, nor because the judgment or decree of the court may affect the territorial limits of the jurisdiction of the states that are parties to the suit. Virginia *v.* West Virginia, 11 Wall. 39.

and purposes, as the true real boundary. The construction of such compact is a judicial question.

There can be but two tribunals, under the constitution, who can act on the boundaries of states, the legislative or the judicial power; the former is limited, in express terms, to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter can be expressed only by this court, when a state is a party, the power is here, or it cannot exist.

This court exists by a direct grant from the people of their judicial power; it is exercised by their authority, as their agent, selected by themselves, for the purposes specified. The people of the states as they respectively became parties to the constitution, gave to the judicial power of the United States, jurisdiction over themselves, controversies between states, between citizens of the same or different states, claiming lands under their conflicting grants, within disputed territory.

No court acts differently in deciding on boundary between states, than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time, or other kindred causes; it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied, without either, they decree what and where the boundary of a farm, a manor, province, or a state, is and shall be.

There is neither the authority of law or reason, for the position, that boundary between nations or states is, in its nature, any more a political question than any other subject on which they may contend; none can be settled without war or treaty, which is by political power; but, under the old and new confederacy, they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before.

It has been contended, that this court cannot proceed in this cause, without some process and rule of decision prescribed appropriate to the case;[1] but no question on process can arise on these pleadings; none is now necessary, as the defendant has appeared and pleaded, which plea, in itself, makes the first point in the cause, without any additional proceeding; that is whether the plea shall be allowed, if sufficient in law, to bar the complaint, or be overruled, as not being a bar in law, though true in fact.

This court cannot presume, that any state which holds prerogative rights for the good of its citizens, and by the constitution, has agreed that those of any other state shall enjoy rights privileges and immunities in each, as its own do, would either do wrong, or deny right to a sister state or its citizens, or refuse to submit *to those decrees of this court, rendered [*659
pursuant to its own delegated authority, when in a monarchy, its fundamental law declares that such decree executes itself.

In the case of Olmstead, this court expressed its opinion, that if state legislatures may annul the judgments of the courts of the United States, and the rights thereby acquired, the constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by its own tribunal; so fatal a result must be deprecated by all; and the people of every state must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

On the 16th of March 1832, the state of Rhode Island, by their solicitor, filed a bill against the state of Massachusetts, for the settlement of boundary between the two states; and moved for a *subpœna* to be issued, according to the practice of the court, in similar cases. This motion was held under advisement until the following term; and *subpœna* was awarded and issued on the 2d of March 1833.

This *subpœna* was returned with service, on the 30th July 1833; and on the 18th January 1834, the appearance of Mr. Webster was entered for the defendants; and on his motion, the cause was continued, with leave to plead,

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[1] In cases in which the court has original jurisdiction, the form of proceeding is not regulated by act of congress, but by the rules and orders of the court. Florida *v.* Georgia, 17 How. 478.

answer or demur. On the 12th of January 1835, a plea and answer was filed by Mr. Webster; and on the 22d of February 1836, by agreement of counsel, it was ordered by the court, that the complainant file a replication to the answer of the defendant, within six months from the last day of January term 1836, or that the cause shall stand dismissed. The complainant filed a replication, on the 18th of August 1836; and at the same term, a "notice of intention to move the court for leave to withdraw the replication, upon the ground that the rule requiring the same was agreed to and entered into by mistake."

The bill filed by the complainants, set forth the original charter, granted on the 3d day of November 1621, by King James I., to the council at Plymouth, for planting, ruling, ordering and governing New England, in America, describing the limits and boundaries of the territory so granted The grant or conveyance to the council at Plymouth, of the 19th of March 1628, to Sir Henry Rosewell and others, of a certain tract of land, described in the same, as "all that part of New England, in America, aforesaid, which lies and extends between a great river there, commonly called Monomack, *alias* Merrimac, and a certain other river, there called Charles river, being in the bottom of a certain bay, there commonly called Massachusetts, *alias* Mattachusetts, *alias* Massatusetts bay; and also, all and *singular
*660] those lands and hereditaments whatsoever, lying within the space of three English miles on the south part of the said Charles river, or of any or every part thereof; and also, all and singular the lands and hereditaments whatsoever, lying and being within the space of three English miles to the southward of the southernmost part of the said bay, called Massachusetts, *alias* Mattachusetts, *alias* Massatusetts bay; and also, all those lands and hereditaments whatsoever, which lie and be within the space of three English miles to the northward of the said river, called Monomack, *alias* Merrimac, or to the northward of any and every part thereof, and all lands and hereditaments whatsoever, lying within the limits aforesaid, north and south, in latitude and breadth, and in length and longitude, of and within all the breadth aforesaid, throughout the main lands there, from the Atlantic and western sea and ocean, on the east part, to the South sea, on the west part." The letters patent of confirmation and grant of Charles I., of 4th of March 1629, to Sir Henry Rosewell and others, for the lands included in the charter of James I.; and the deed of the council of Plymouth to them, by the name of "The Governor and Company of Mattachusetts Bay, in New England," incorporated by the said letters-patent.

The bill further stated, that on the 7th day of June 1635, the council established at Plymouth for planting a colony and governing New England, in America, yielded up and surrendered the charter of James I., to Charles I.; which surrender was duly and in form accepted. That after the granting of the letters-patent, before set forth, and prior to the granting of the letters-patent afterwards set forth in the bill to the colony of Rhode Island and Providence Plantations, the tract of land comprised within the limits of the state of Rhode Island and Providence Plantations, had been colonized and settled with a considerable population, by emigration, principally from England and the colony of the Massachusetts bay; and that the persons who had so colonised and settled the same were seised and possessed, by

purchase and consent of the Indian natives, of certain lands, islands, rivers, harbors and roads, within said tract. That on the 8th of July 1663, King Charles II., by letters-patent, granted a charter of incorporation to William Brenton, John Coddington and others, by the name of "The Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America;" and granted and conferred to the corporation, by the letters-patent, "all that part of *our dominions in New England, in America, containing the Nahantick and Nanhygansett, *alias* Narragansett bay, and countries and parts adjacent, bounded on the west or westerly, to the middle or channel of a river there, commonly called and known by the name of Pawcatuck, *alias* Pawcawtuck river; and so along the said river, as the greater or middle stream thereof reacheth or lies up into the north country, northward, unto the head thereof; and from thence, by a straight line drawn due north, until it meets with the south line of the Massachusetts colony; and on the north or northerly, by the aforesaid south or southerly line of the Massachusetts colony or plantation and extending towards the east or eastwardly, three English miles, to the east and north-east of the most eastern and north-eastern parts of the aforesaid Narragansett bay, as the said bay lieth or extendeth itself from the ocean, on the south or southwardly, unto the mouth of the river which runneth towards the town of Providence; and from thence along the eastwardly side or bank of the said river (higher called by the name of Seacunck river) up to the falls called Patucket falls, being the most westwardly line of Plymouth colony; and so from the said falls, in a straight line, due north, until it meet with the aforesaid line of the Massachusetts colony, and bounded on the south by the ocean. And in particular, the lands belonging, to the town of Providence, Pawtuxet, Warwick, Nisquammacock, *alias* Pawcatuck, and the rest upon the main land, in the tract aforesaid, together with Rhode Island, Block Island, and all the rest of the islands and banks in the Narragansett bay, and bordering upon the coast of the tract aforesaid (Fisher Island only excepted); together with all firm lands, soils, grounds, havens, ports, rivers, waters, fishings, mines royal, and all other mines, minerals, precious stones, quarries, woods, wood grounds, rocks, slates, and all and singular other commodities, jurisdictions, royalties, privileges, franchises, pre-eminences and hereditaments whatsoever, within the said tract, bounds, lands and islands aforesaid, or to them, or any of them, belonging or in any wise appertaining." [*661

The bill proceeded to state the cancelling and vacating of the charter to "The Governor and Company of Massachusetts bay, in New England," on a *scire facias;* and afterwards the re-grant of the same territory, with other territories known by the name of the colony of Massachusetts Bay and colony of New Plymouth, the province of Maine, &c., by King William and Queen Mary, on the 7th of *October 1691. The description of the territory then granted, so far as the same is important in this case, was the following: [*662

"All that part of New England, in America, lying and extending from the great river commonly called Monomack, *alias* Merrimack, on the north part, and from three miles northward of the said river, to the Atlantic or western sea or ocean, on the south part, and all the lands and hereditaments whatsoever, lying within the limits aforesaid, and extending as far as the

outermost points or promontories of land called Cape Cod and Cape Malabar, north and south, and in latitude, breadth, and in length and longitude, of and within all the breadth and compass aforesaid, throughout the main land there, from the said Atlantic or western sea and ocean, on the east part, towards the South sea, or westward, as far as our colonies of Rhode Island, Connecticut and the Narragansett country. And also, all that part and portion of main land, beginning at the entrance of Piscataway harbor, and so to pass up the same, into the river of Newichwannock, and through the same, into the furthest head thereof, and from thence north-westward, till one hundred and twenty miles be finished, and from Piscataway harbor mouth aforesaid, north-eastward, along the sea coast, to Sagadehock, and from the period of one hundred and twenty miles, aforesaid, to cross over land to the one hundred and twenty miles before reckoned, up into the land from Piscataway harbor, through Newichwannock river, and also the north half of the Isles of Shoals, together with the Isles of Capawock and Nantuckett, near Cape Code aforesaid; and also, the lands and hereditaments lying and being in the country or territory commonly, call Accada or Nova Scotia; and all those lands and hereditaments lying and extending between the said country or territority of Nova Scotia and the said river of Sagadehock, or any part thereof."

The bill stated, that the province of Massachusetts and the colony of Rhode Island and Providence Plantations, thus established, continued under the charters and letters-patents, until July 4th, 1776, when with their sister colonies, they became independent states. The bill alleged the dividing boundary line, under the letters patent and charter to the colony of Rhode Island and Providence Plantations and Massachusetts, to have been "a line drawn east and west, three English miles south of the river called Charles river, or of any or every part thereof." That for some years after the granting of the charter to Rhode Island, the lands included in the colony adjoining Massachusetts, remained wild and uncultivated, and were of little value; *that previous to 1709, the inhabitants of Rhode Island entered on parts of the land and made improvements; and that the said northern boundary line never having been settled, defined or established, disputes and controversies arose between the inhabitants of the province of the Massachusetts Bay and of the colony of Rhode Island and Providence Plantations, and between the governments of the said province and colony, in relation to the boundary of said colony.

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The bill proceeded to state, that in consequence of various disputes and controversies about the boundary between the two colonies, numerous efforts were made to adjust and settle the same; all of which, as the bill alleged, were not productive of a satisfactory result to the colony of Rhode Island and Providence Plantations; and to the state of Rhode Island, afterwards established. These were particularly set forth in the bill; and the proceedings of the legislatures of Rhode Island and Massachusetts were given at large in the same, with the operations of the commissioners appointed and acting under the authority thereof. After stating the efforts made by the two states, both whilst colonies and after they became independent states, for the determination of the line, up to 1791 (alleged to have been abortive and without success); the bill proceeded to state, "That on or about the year of our Lord 1709, other commissioners were appointed by

the said state of Rhode Island and Providence Plantations and the said state of Massachusetts, for the purpose of ascertaining and settling the said northern line of the said state of Rhode Island and Providence Plantations; that the said last-mentioned commissioners respectively, continued such commissioners, until the year of our Lord 1718; and that the said last-mentioned commissioners had several meetings, but were never able to agree upon and settle, and never did agree upon and settle, the said northern line of the said state of Rhode Island and Providence Plantations."

The bill asserted the right of Rhode Island to the territory in dispute; that Massachusetts was in possession of the same, and exercised and asserted sovereignty and jurisdiction over the same, under the pretence that the same was included in the grants or charters from the crown of England, under the mistaken belief, that the line, three miles south of Charles river (a station having been fixed by Nathaniel Woodword and Solomon Saffrey, as the point three miles south of Charles river) actually ran where Massachusetts had assumed it to run; and alleging that the line as it was claimed, and had always been *claimed by Massachusetts, was settled and adjusted by the commissioners acting under the authority of the parties respectively. [*664

The bill proceeded to show the errors of proceedings of the commissioners acting for the two colonies; and stated, "That no mark, stake or monument at that time existed, by which the place in which said Woodword and Saffrey were, so as aforesaid, alleged to have set up a stake, could then be ascertained. That the person who executed, witnessed and consented to the said pretended agreement, did not, nor did any or either of them, go to any place where said stake was alleged to have been set up; nor did they, or any or either of them, make any survey, or cause any survey to be made, or run any line or lines, or cause any line or lines to be run, or take any other means to ascertain at what place, if any, the said stake was set up by said Woodword and Saffrey; nor whether the place in which the said stake was alleged as aforesaid to have been set up by the said Woodword and Saffrey was in fact three English miles, and no more, south of the river called Charles river, or of any or every part thereof; nor whether the said line, alleged in said pretended agreement to have been run by the said Woodword and Saffrey, was ever in fact run by said Woodword and Saffrey; nor whether said pretended line was the true and proper boundary line between the said province of the Massachusetts Bay on the north, and the said colony of Rhode Island and Providence Plantations on the south, according to the true intent and meaning of the grants contained in the respective charters or letters-patent aforesaid."

The bill asserted, that the line designated and run under the agreement, had always been resisted by Rhode Island, while a colony, and since she became a sovereign state; and that no other boundary than that asserted in the bill, between Rhode Island and Massachusetts, than that defined, granted and established in and by the respective charters and letters-patent aforesaid therein before set forth, according to the true and fair construction thereof, had ever been consented to, or admitted to be the true boundary line, by the complainants; either while she continued under the royal government, or since she became an independent and sovereign state. The proceedings of Massachusetts were alleged to "interfere with and prevent the exercise

of that jurisdiction and sovereignty which, by the law of the land and the constitution of the Union, she is entitled to exercise over the whole tract of land mentioned and described in the charter or letters-patent granted to the
*665] said colony of Rhode Island and *Providence Plantations, and hereinbefore set forth, and over the citizens and inhabitants thereof, according to her claim in this her bill made."

The bill asked, that inasmuch as the complainants had no satisfactory relief on the common-law side of the court, "especially as the controversy concerns questions of jurisdiction and sovereignty," that the commonwealth of Massachusetts answer the matters set forth in the bill; and that "the northern boundary line between the complainants and the state of Massachusetts may, by the order and decree of this honorable court, be ascertained and established; and that the rights of jurisdiction and sovereignty of the complainants to the whole tract of land, with the appurtenances mentioned, described and granted, in and by the said charter or letters-patent, to the said colony of Rhode Island and Providence Plantations, hereinbefore set forth, and running on the north, an east and west line, drawn three miles south of the waters of said Charles river, or of any or every part thereof, may be restored and confirmed to the complainants, and the complainants may be quieted in the full and free enjoyment of her jurisdiction and sovereignty over the same; and the title, jurisdiction and sovereignty of the said state of Rhode Island and Providence Plantations over the same be confirmed and established by the decree of the court; and that the complainants may have such other and further relief in the premises, as to the court shall seem meet and consistent with equity and good conscience."

"The plea and answer of the commonwealth of Massachusetts, to the bill of complaint of the state of Rhode Island," alleged, that in 1642, for the purpose of ascertaining the true southern boundary line of Massachusetts, a station or monument was erected and fixed, at a point south of Charles river taken and believed to be on the true and real boundary line of the colony of Massachusetts; which monument became and had ever since been well known and notorious, and then was, and ever since had been, called Woodword and Saffrey's station, on Wrentham Plains; and after the fixing of said station, and after running of the line aforesaid, and after the granting of the charter of Rhode Island, and while all the territory north of said station and line was claimed, held and possessed, and jurisdiction over the same exercised and enjoyed, by Massachusetts, as parcel of her own territory, about the year 1709, dispute and controversy having arisen between the
*666] two governments respecting the said boundary line, *persons were appointed by the government of Rhode Island and by the government of Massachusetts, to settle the misunderstanding about the line between the colonies; and what the persons appointed should agree upon, should be for ever after taken and deemed to be the stated lines and bounds, so as the agreement be drawn up in writing, and indented, under their hands and seals, within six months as aforesaid.

That afterwards, on the 19th January 1710, the commissioners appointed by the colonies met, and entered into an "agreement of the partition line betwixt the colony of Massachusetts and the colony of Rhode Island," by which it was declared, "that the stake set up by Nathaniel Woodword and

Solomon Saffrey, skilful approved artists, in the year of our Lord 1642, and since that often renewed, in the latitude of 41° 55′, being three English miles distant southward from the southernmost part of the river called Charles river, agreeable to the letters-patent for the Massachusetts province, be accompted and allowed, on both sides, the commencement of the line between the Massachusetts and the colony of Rhode Island, and to be continued betwixt the said two governments, in such manner as that, after it has proceeded between the said two governments, it may pass over Connecticut river, at or near Bissell's house; as is decyphered in the plan and tract of that line, by Nathaniel Woodword and Solomon Saffrey."

By this agreement, on a presumption, that there had been error in setting up the station, certain surveys had been made within the line of Massachusetts, thus ascertained, it stipulated, that there should "be and remain unto the said town of Providence and inhabitants of the government of Rhode Island and Providence Plantations, a certain tract of land, of one mile in breadth, to the northward of the said line of Woodword and Saffrey, as before described and platted, beginning from the great river of Pautucket, and so to proceed at the north side of the said patent line, of equal breadth, until it came to the place where Providence west line cuts the said patent line, supposed to contain 5000 acres, be the same more or less; the soil whereof shall be and remain to the town of Providence, or others, according to the disposition thereof to be made by the government of Rhode Island aforesaid. Nevertheless, to continue and remain within the jurisdiction and government of her majesty's province of the Massachusetts Bay, anything in this agreement to the contrary thereof, or seemingly so, notwithstanding." *The agreement contained other provisions for the preservation of the line, and for the ascertaining the surveys [*667 made by the inhabitants of Providence within the same; so that they might proceed with the settlement and improvement thereof. This agreement was executed under the hands and seals of the commissioners, and was witnessed by persons on the part of the two colonies.

The plea and answer alleged, that the whole of the real and true merits of the complainants' supposed cause of action were fully heard, tried and determined by the judgment and agreement of the commissioners; that the same was a full settlement of all the matters in controversy, and was made in good faith; and the station, so fixed and established, became matter of common notoriety, and the line capable of being always known and ascertained.

The answer and plea further stated, that afterwards, on or about June 18th, 1717, to complete the settling and running the line between the two governments, the general assembly of Massachusetts passed an order, appointing commissioners, to meet commissioners to be appointed by Rhode Island, to run the line according to the agreement of January 19th, 1710. Certain other proceedings on the part of Massachusetts took place, preparatory to the proceedings of the commissioners; and on the 17th June 1717, the general assembly of the colony of Rhode Island and Providence Plantations passed an act, appointing commissioners on the part of Rhode Island, for the final settlement of the boundary line with the commissioners named and appointed by Massachusetts. On or about the 22d of October 1718, the commissioners met, and then made an agreement, which was signed, sealed,

executed and delivered by them, by which it was stiputated and declared, "That the stake set up by Nathaniel Woodword and Solomon Saffrey, in the year 1642, upon Wrentham Plains, be the station or commencement to begin the line which shall divide between the two governments aforesaid, from which said stake, the dividing line shall run, so as it may (at Connecticut river) be two miles and a half to the southward of a due west line, allowing the variation of the compass to be nine degrees, which said line shall for ever be and remain to be the dividing line and boundary between the said governments, any former difference, controversy, claim, demand or challenge whatsoever notwithstanding." And on the 29th day of the said October last aforesaid, the general assembly of the said colony of *668] *Rhode Island and Providence Plantations accepted the agreement of the said commissioners, and caused the same to be duly recorded; and thereby ratified and confirmed the same.

The answer averred, that all this was done in good faith, and with a full and equal knowledge of all thecircumstances by the respective parties; and that the same had never been annulled, rescinded or abandoned; and the last agreement was in pursuance of the agreement of 1709. Afterwards, on the 14th May 1719, the commissioners on the part of Massachusetts and Rhode Island, signed a report, return and statement of their proceedings, under the designation of "The subscribers, being of the committee appointed and empowered by the governments of the province of Massachusetts Bay and the colony of Rhode Island and Providence Plantations for settling the east and west line between the said government," stating that they had met at the stake of Nathaniel Woodword and Salomon Saffrey, on Wrentham Plains, and had run the line, placing heaps of stones and marking trees to designate the same.

The defendant further alleged, "that the said report, return or statement was, afterwards, that is to say, on or about the 16th day of June, in the year of our Lord 1719, approved by the general assembly of the said colony of Rhode Island and Providence Plantations;" and the defendant alleged, that from the date of the said agreement to the present time, the said commonwealth of Massachusetts had possessed and enjoyed all the territory, and exercised jurisdiction over the same, north of the said line, as prescribed in the said agreements of October 1718, without hindrance or molestation; and the said defendant averred, that both the points of beginning agreed upon by said parties to said agreement, viz., the stake or station set up by the said Woodword and Saffrey, and the line run therefrom to Connecticut river, then were, ever since had been, and still were, well known and notorious; that the whole boundary line fixed on by said agreement was precise, definite and certain; and that the said defendant had occupied and exercised jurisdiction, and enjoyed all rights of sovereignty, according to the same, from the date thereof to the present time.

The defendant pleaded the agreement of 19th January 1710, and the agreement in pursuance and confirmation thereof of 22d October 1717; and unmolested possession under the same, from their date; in bar of the whole bill of the complainants; and prayed judgment accordingly.

*669] *The answer and plea further averred, that the agreements stated were made and entered into with full knowledge of all the circumstances by both parties; that the same were a valid and effectual settlement

of the matters in controversy; and were made and entered into without fraud or misrepresentation; and the station settled there had been notorious, and the line run therefrom had always been known, and its marks and memorials capable of being discerned and renewed.

Webster, of counsel for the state of Massachusetts, moved to dismiss the bill filed by the state of Rhode Island, on the ground, that the court had no jurisdiction of the cause.

The motion was argued by *Austin*, Attorney-General of the state of Massachusetts, and by *Webster*, on the part of the state of Massachusetts; and by *Hazard* and *Southard*, for the state of Rhode Island.

Austin, in support of the motion:—This is an action by bill on the equity side of the court, instituted by the state of Rhode Island, against the state of Massachusetts. The bill asserts the claim of Rhode Island to jurisdiction and sovereignty over a portion of territory, therein particularly described. The territory, so described, comprises between 80 and 100 square miles, being a part of six townships, incorporated under the laws of Massachusetts, with a population of about 5000 persons, at present citizens of that state; and not less than $500,000 of taxable property. But the bill makes no claim to any right of soil; it does not seek to disturb the title of the present possessors of the land, whose ancestors probably derived their title from the grants of the early government in Massachusetts. It admits, that the sovereignty and jurisdiction which it seeks to acquire, now is, and always, heretofore, from the first settlement of the country, have, in point of fact, been enjoyed and possessed, first by the colony, afterwards by the province of Massachusetts, and then by the state of Massachusetts, at the declaration of American independence, at the adoption of the constitution of the United States, and uninterruptedly to the present time; but avers that the territory over which jurisdiction and sovereignty are now demanded for Rhode Island, was not included within the boundary of the ancient colony of Massachusetts, in 1642, but was *contained in the description of the limits of Rhode Island, as established by the charter of [*670
Charles II., made to her as a colony of Great Britain, in 1663; and by force of that charter, ought now rightfully to be enjoyed by her; but that Massachusetts wrongfully usurped jurisdiction and sovereignty over the territory thus claimed, and now possesses it, and has always possessed it, without right. The complainant, therefore, asks of this court, that the northern boundary line between the complainant and the state of Massachusetts may, by the order and decree of this honorable court, be ascertained and established, and that the rights of jurisdiction and sovereignty of the complainant, may be restored and confirmed to the said complainant; and the complainant may be quieted in the full and free enjoyment of her jurisdiction and sovereignty over the same; "and the title, jurisdiction and sovereignty of said state of Rhode Island be confirmed and established by the decree of this honorable court, and that your complainant may have such other and further relief in the premises, as to this honorable court shall seem meet, and consistent with equity and good conscience."

Among the allegations of the bill, it appears, that a commission for the establishment of the partition line between the two colonies, was appointed by the respective local governments thereof; and that the commissioners, on

the 19th January 1710–11, agreed upon and established the line, as it now is, and always before had been, known, possessed and established. But the complainant seeks, for various causes, which are in the bill enumerated, to set aside this agreement and adjudication of commissioners, as null and void.

The respondent has filed a special plea in bar to the complainant's demand, grounded on the arbitration, award and settlement made by those commissioners; and a constant and uninterrupted possession under it, for more than a century; and has answered in full all the allegations by which the complainant seeks to vacate this award. And the respondent well hoped it would have been the pleasure of Rhode Island to have discussed the merits and effect of this ancient adjudication; but when her learned counsel, under an order of this court to answer the respondent's plea, filed a general replication, they accompanied the same with notice of an intention to move to withdraw the same; and have since intimated a desire to change and amend the tenor of the bill itself. To all this there would be no other objection but the inconvenience of delay, and the trouble *of keeping open a litigation so extensive in its operation. To bring the whole matter to a speedier issue, Massachusetts presents only a single point of her defence.

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A motion is now made to dismiss the bill for want of jurisdiction. In establishing the government of the United States, the 3d article of the constitution, and second section, provides, that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, &c.; in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. Whether the subject of the present suit is a controversy between states, within the meaning of the constitution; and whether, if it be so considered, a law of congress is necessary to the exercise of judicial power by this court in the premises; and whether, if such law be necessary, any sufficient action has been had by congress to authorize judicial proceedings, are questions which, under this motion, are to be examined and decided.

In support of the motion to dismiss the bill, it is contended, that this court has no jurisdiction over the present suit: 1. Because of the character of the respondent, independent of the nature of the suit. 2. Because of the nature of the suit, independent of the character of the respondent. If the first of the propositions can be maintained, the result is, that in the present state of the law, this court cannot entertain jurisdiction over a state of this Union, for any cause. If that may be doubtful, and the second proposition is established; it will result in this, that the subject-matter of this suit, being for sovereignty and sovereign rights, is beyond the jurisdiction of a judicial court.

To the jurisdiction of a court of the United States, in every case, two circumstances must concur. 1st, The party, or the subject of the suit, must be one to which the judicial power of the government extends, as that power is defined by the constitution; and 2d, There must be some rule of decision

established by the supreme *power of the country, by the administration of which the right of the parties to the matter in controversy may be determined.

The government of the United States does not come, by inheritance or succession, into any judicial power. In this respect, it is essentially different from all other governments known in the history of the world. Where a nation has been established by colony or by conquest, there was a foundation in the institutions of the parent state, or the victors, on which its municipal establishments should be placed. Its own domestic arrangements, if it had any, remained, until changed by paramount authority. Such was the case with the states of this Union, when they ceased to be colonies. The government of the United States is a new government, beginning with the constitution. Although the confederation was its prototype, there was no general government, and certainly, no national or federal judiciary, until the constitution had formed one. The government of the United States may, therefore, exercise all, but no more than all, the judicial power provided for it by the constitution.

The third article of that instrument contains a declaration of the existence and extent of this new power. It ascertains the parties, the causes, and the courts, for judicial action. To a certain extent, it establishes the rule of decision; and perhaps, this particular branch of the inquiry into the jurisdiction of the court in this case, will depend on ascertaining how far the rule of decisionis carried by the constitution; because, if the party and the controversy, and the rule for deciding the merits of the controversy are, by the constitution, given to this court; there can be no impediment to its action in this particular. It is admitted, that by the express words for the constitution, the judicial power of the United States extends to controversies between two or more states. The party, therefore, may be within the operation of the judicial power, in case such a controversy as is contemplated by the constitution exists with one or more states.

Does the term *controversies* extend to all controversies? It is to be observed, that the word "all," which is prefixed to the other classes of cases, is here omitted. The judicial power extends to as cases under the laws of the United States; all cases under the treaties made, &c.; all cases affecting ambassadors, &c.; all cases of maritime and admiralty jurisdiction; but its phraseology is changed, and the universality limited, by the omission of the word "all," *when it relates to controversies to which the United States shall be a party, and to controversies between two or more [*673 states. The judicial power, then, does not reach to all possible controversies to which the United States shall be a party, or between two or more states.

What are the limitations? The first are those which are made by the character of the tribunal; and are included in the terms judicial power; and the words "law and equity," which precede the enumeration of the subject-matters of judicial cognisance. Although the government formed by the constitution, was a new government, and took nothing by succession or custom; the men who framed the constitution were educated to an intimate acquaintance with the judicial institutions of England, whose laws were, to a great degree, the foundation of own, and whose language, when used by them in this relation, must be deemed to have a technical meaning.

A judicial power means, therefore, a power to interpret, and not to make, the laws; and the terms "law and equity," have reference to that complicated code of the mother country; extensive, but not universal, and limited in its operation by well-settled decisions. A limitation on the broad terms of the grant, is necessarily implied in other branches of this power. The judicial power extends to controversies to which the United States shall be a party, and between a state and foreign states; but it would be manifestly absurd, to bring the political disputes of the day, nullification, abolition, slavery (and the controversies which are beginning to arise between states concerning them), to the decision of a jury-trial in a court of law. It is submitted also, that controversies between states must be limited to those which begin with the states in that capacity, and does not extend to the antiquated controversies existing between the colonies, to which the states may or may not have succeeded, according to circumstances, which a judicial court can have no means to ascertain.

But the proper mode of considering this article of the constitution, in relation to the judicial power, is to take the constitution as a whole, and keep constantly in mind, the grand design and intention of its framers; always regarding it as unique, original and consistent with itself. The grand object of its framers was, to establish a common government for sovereign states, and to have that sovereignty *unimpaired, wherever it *674] could so be left, without impairing the government of the Union. The judicial power of the United States is a power, in this view of the case, all or any part of which the government of the United States might exercise, through the appropriate department which was to be established. It extends to such controversies between two or more states, as are properly within the decision of law and equity, in the precise sense of those terms, arising between the states, in virtue of their relation as states; and to be proceeded with and decided according to the customary forms or judicial proceedings, and the established doctrines of known and acknowledged laws. Every state, by virtue of its sovereignty, and every citizen of every state, by virtue of his allegiance to such state, stands absolved from the jurisdiction of the judicial power of the United States; until the government of the United States, putting into operation so much of the judicial power granted by the constitution as is necessary for the purpose, has organized a court, established the rules of decision, directed the forms of its process, and designated the subjects for its cognisance; not exceeding, in any of these respects, the power assigned to it by the constitution itself.

If, therefore, there is no law regulating the intercourse between the states of the Union, there is no rule for settling a controversy that may arise between two or more states, by reason of such intercourse. If it then should be admitted, that a law could be made binding the intercourse of states, and that one state might sue another state for a breach of such law; yet, until such a law exists, this court can entertain no jurisdiction, because the state having a character above or beyond the existing law, is not amenable to any superior; and the court having no law to expound, cannot settle a judicial controversy, depending, as all such controversies do, on the question whether the conduct complained of, has, in the case presented, conformed to, or departed from, the obligations which are imposed by law.

The positions, then, which, to carry out this doctrine, are next to be established, are—that the jurisdiction of this court in any particular case, depends on some adequate legislative provision for the exercise of its powers, under the constitution : and secondly, that in point of fact, no law is now in force which operates judicially on a state of this Union. A legislative provision, it is contended, is necessary for two purposes ; first, to regulate the form of process from the citation to the *judgment and execu- [*675 tion, without which last, judicial action is a mere mockery ; and secondly, to establish the law of the case, or the rule of action by which the conduct of the litigants is to be tried. In regard to the last, which, as the most material, may be first considered, it supposed, that no doubt can exist as to the necessity of such law, as a pre-requisite to judicial action. Judges are to expound the law, not to make it. The only pertinent question then is, does any existing law, which this court can recognise, act upon and regulate the intercourse between the states of the Union ?

It is supposed, that when a nation is established, and becomes, by revolution or otherwise, a member of the family or nations, it is, *ipso facto*, under the operation of international law. But not only does the doctrine of international law apply to the nation, and not to the states of our confederacy ; but the law itself is not the subject of administration by judicial tribunals, when it operates on communities. Ambassadors are its counsellors ; and its argument, the *ultima ratio regum*. If the principles of international law are made applicable to individuals in a judicial *forum*, it is because the municipal law of the place has incorporated the international law as a part of itself, and administers it, by the force of domestic legislation. The constitution may itself establish a rule of decision. It does so, in the case of treaties, which are declared to be the supreme law of the land ; and it provides that its own provisions shall be binding on judges in all the states. Whatever difficulties might be found in a judicial administration of the constitution or a treaty, between individual litigants, claiming rights under them, without the aid of a law of congress, they may all be done away, without touching this case ; because nothing is claimed by the constitution or any treaty of the United States, to show the right of the claimant in the present case, or bind the respondent to any prescribed course of action. The necessity of a law of congress to establish, by direct enactment, or by implication, the code of the United States, has been admitted by this court. *Martin* v. *Hunter*, 1 Wheat. 329. And it is supposed by the court, in giving its opinion in that case, that congress was bound to vest in its courts all the judicial power of the government.

Congress has judged differently, because it has not appropriated all the judicial power of the government. But the question here is not whether congress is wrong in the omission, but whether, in a clear case of omission, this or any court of the United States can *supply the defect. In a [*676 very early period of the history of this court, it was supposed, that the states, like individuals, were amenable to its jurisdiction ; and under that impression, it was intimated in argument, and seemingly sustained by the majority of the court, that the moment a supreme court is formed, it is to exercise all the judicial powers vested in it by the constitution, whether the legislature have prescribed methods for its doing so or not. *Chisholm's Ex'rs* v. *State of Georgia*, 2 Dall. 419. The opinion of the court was not

unanimous; and Judge IREDELL's dissenting opinion has become, by the 11th article of amendment of the constitution, the better authority. It is to be observed, that this amendment does not change the text of the constitution. That remains the same. The amendment declares, that the judicial power shall not be deemed to extend to a case, which by the construction of the court, it had in the above case been made to reach. It is further to be remarked, that all the subsequent proceedings of this court in regard to states defendants, have, so far as they have proceeded, been fastened to this case. But the case being overruled by a higher tribunal than even this august court, in a mode perfectly legal, it is submitted, that no *dictum*, and no principle promulgated in it, can have the authority of law.

The necessity of a code of laws for the government of judicial action being apparent, congress has attempted to establish one. This is done, so far as it is done at all, by the judiciary act of 1789. This statute adopts, in the 34th section, the laws of the states, as a rule of action, where they can apply. But as no law of Massachusetts or Rhode Island can embrace the respondent in this particular matter, there is, by that section, no rule prescribed for the present controversy.

It has been contended, that the statute aforesaid, taken in connection with the constitution itself, established a code, mixed and miscellaneous, made up of the common law and equity practice of Great Britain, modified by our particular institutions, which serves as the basis of judicial action. To a certain extent, this is undoubtedly so, in many, if not all, the old states; but to what extent it is true in regard to the United States, has been a debatable question, and is not yet definitely settled. It is not necessarily to settle it in this case; because, if the common law and chancery law of England are in operation here, in their utmost latitude and force, they do not reach the respondent. *The common law of England
*677] takes no jurisdiction over the actions of sovereign states; nor is there any power in chancery, to hold jurisdiction over a sovereign, without his consent.

Such is the character of the states, respectively, of this Union. This proposition it is not intended to discuss. No man, who has at all studied the constitution of the country, can fail to have his mind made up on this point, on the one side or the other. It is maintained by the respondent, that every American state is a qualified sovereignty, and as such exempted, by common law (meaning thereby, the whole judicial code of the country), from judicial responsibility. It is not contended, that a law may not be constitutionally made to reach a state. The question under discussion is, whether the present law extends to a state. The present law is what we term, by eminence, and for distinction, the common law; and it is beyond all controversy, that the common law operates on subjects only, and not sovereigns; and upon property, and not sovereign rights. If the constitution authorizes the government of the United States to subject a state to judicial process and judgment, the government of the United States may pass the laws necessary for the purpose. But to declare what may be done, is not to declare what is done. If congress, for any reason, has stopped short, the judicial department is, at the same point, brought to a stand. If it has adopted the common law, and nothing more, the court can do no more

than the common law warrants. If the common law does not extend its jurisdiction over a sovereignty, neither can the court.

The doctrine contended for is that alone which prevents a suit against the United States by every individual who has a demand in dispute. The constitution is as unlimited in regard to the United States as the states. The judicial power extends to controversies to which the United States shall be a party. And in the earlier decisions of this court, it is maintained, that it is the same thing, as regards jurisdiction, whether the party designated the plaintiff or defendant. The state of Massachusetts, instead of soliciting congress for an adjustment of its claim, might have instituted a suit in this court, obtained, if it would, a judgment, and levied its execution on a ship of the line, or the arsenals of the country. The sovereignty of the United States, carried to its legitimate consequences, protects it from this extravagant absurdity. But *Chief Justice JAY, when, in his [*678
opinion in the *Georgia Case*, he rode over state sovereignties, admitted, that the logical conclusion of his argument involved a liability on the part of the United States to a suit at law. He avoids it, however, by the extraordinary suggestion, that "in all cases against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to aid." *Georgia Case*, 2 Dall. 478. What is this but an abandonment of duty, through fear. It would have been better to adopt the maxim of the English lord chief justice: *fiat justitia, ruat cœlum.* The better answer is, that by the law, as it stands, no action in a judicial court can be maintained against a sovereignty, whether state or national. That the constitution has, in both cases, authorized congress so to frame and pass laws, that the judicial power may operate on the one and the other; but until that is done, any action of the judiciary would not be, to expound the law of the case, but to make one.

But the United States are sometimes sued. This is in cases of contract, or other similar causes of action, in which the United States, dealing as a private citizen with other citizens, consents to come into a court of justice, and submit to the operation and construction of she laws of the land. The laws of the land reach to contracts. The United States makes a contract; and when it submits, by its own consent, to a suit, admits expressly, that in the decision, the law of contract shall apply to its case. The United States makes a treaty; and by the constitution, a treaty is the law of the land. It claims for itself land, under that treaty; takes possession, and cannot be ousted by a suit at law, in virtue of its sovereignty. But it waives its sovereignty, and submits its title under the treaty, to arbitrament by commissioners, or to a judicial decision in a court of law. Have the states consented to be used? Unquestionably, the provision of the constitution is their consent to exactly what that provision contains; but the inquiry is not of consent, but construction.

Massachusetts does not propose to take herself out of the constitution, or to withdraw from any of its obligations. She admits, that under certain circumstances, she has agreed to waive her sovereignty, and submit her controversies to judicial decision; but maintains, that *before she [*679
can be called upon to do this, a court must be established, a law

made, or a code propounded, suitable to the decision of her case; and the forms of process, mode of proceeding, character of judgment, and means of enforcing it, be first established by legislative authority. But the United States never has submitted its sovereign rights, or its acts in its sovereign capacity, to judicial cognisance, and never can; and the states, as is contended, by agreement to submit their controversies to judicial decrees, never intended to include in these controversies questions of sovereign right, for the regulation of which no law is made; and no law ever can be made by any other power than themselves, and each one for itself alone.

This view of the case is greatly fortified by considering the law which the complainant desires this court to administer. This, indeed, may be deemed to belong to the merits of the case; and it does so. But it is also an appropriate subject of examination, under the motion now submitted. One of the grounds of this motion is, that there is no existing law of the country binding on these parties, applicable to the controversy between them, which this court can administer. This would be exceedingly obvious, if the complainant had presented his title under the bull of Pope Nicholas V., by which he divided all the countries to be discovered from Africa to India; or under Alexander VI., in which he divided three-quarters of the habitable globe: *Omnes insulas et terras firmas inventus aut inveniendus, detectas et detegendas*, &c.

The claim set forth in the bill is, in the judgment of the respondent's counsel, extra-judicial and untenable. The state of Rhode Island states its claim to be thus: By the charter given to certain persons by Charles I., king of England, bearing date the 4th March 1628, the colony of Massachusetts was established, with a territory bounded on the south by a line drawn within the space of three English miles, on the south part of the said river called Charles river, or of any or of every part thereof. That a charter was granted by Charles II., on or about 8th July 1663, establishing the colony of Rhode Island, by which its northern boundary was defined in these words, "on the north or northerly, by the aforesaid south or southerly line of Massachusetts colony or plantation." By these two charters, the boundaries of the two colonies were adjacent and conterminous. That after
*680] the vacating of the colony charter of Massachusetts in *1684, and the granting a province charter in 1691 (which so far as this matter is concerned, established the same conterminous boundary, by the same words), the government of Massachusetts, about 1719, wrongfully possessed herself of a tract of land more southerly than a true line would be drawn, which should be run three miles south of the river called Charles river, or of any and every part thereof, "and extending the whole length of the north line of the colony of Rhode Island, being more than twenty miles in length and four miles and fifty-six rods in breadth, in the east end thereof, and more than five miles in breadth at the west end thereof, and has since continued wrongfully to exercise jurisdiction over the same." From other parts of the complainant's statement, it is apparent, that the true place for the dividing line was then admitted by both parties to be that described in the charter, and that it was drawn, and the territory occupied by the province of Massachusetts, on a claim of right; that the place of location was the place designated in the charter. The possession of Massachusetts, *per fas aut nefas*, from that time, is admitted.

The title of Rhode Island to the premises, admitting she is right in the construction of the charter, and the point from which the boundary line should be drawn (in which, at a proper time, it will be proved she is in great error), depends on the validity of a grant by charter of the British crown, against an adverse possession of more than one hundred years; first by a province, and next by a state of the Union; through all the vicissitudes of war, revolution and independence. If, therefore, such a charter, admitting its existence, gives no title against an adverse possession; and especially, if the declaration of American independence, and the subsequent formation of a federal government, to be judicially noticed by this court, have vacated the law, or supposed law, on which the claimant rests its title, and this so plainly, that the charter cannot be inquired of by the court, but that under the constitution, it is bound by events subsequent to the declaration of independence, in all that respects states, because the states were thereby created; then, even, under this motion to dismiss for want of jurisdiction, the bill must be dismissed.

Such is conceived to be the case. The state of Massachusetts makes no claim for herself; and admits none for Rhode Island, by force or virtue of any grant, charter or authority from the British crown. Whatever might have been, in ancient times, the validity *of these instruments of royal power, they ceased, at the declaration of American independence, to have any judicial operation on the great corporations or colonies they had contributed to establish. Massachusetts, when she became a state, became so in the integrity of her whole territory, as it was then possessed by her, whenever or however acquired, by grant, charter, purchase, treaty or force of arms, claiming her actual possession as the ultimate evidence of right, and denying that there then existed, or yet exists, any human tribunal that can lawfully inquire how or by what means that possession was obtained; or that any authority exists to determine the limits of an original state of the Union, in any other way than by determining what it was, *de facto*, on the 4th July 1776. [*681

So far as regards Great Britain and other foreign nations, the treaty of peace, in 1783, settled the exterior boundary of the United States; but in what proportions it was owned by the thirteen sovereignties, then commencing a political existence, was to be adjusted by themselves. This adjustment was a matter of agreement, then to be made, or to rest on the fact of possession; which, admitting no higher title, and capable of no higher proof, assumed the right from the exercise of the right; and it would now be as wise to inquire how the seven Saxon kingdoms of Great Britain were established, or to define the limits of the heptarchy, as to attempt to decide what constitutes a state of the American Union, beyond the fact, that so it was, when the nation was proclaimed independent, or the confederacy was established under the constitution.

There have been many decisions in this court, affirming the original validity of British grants of land, and of government. It is not proposed to set up any principle militating with these decisions. A careful examination of each of them, will show a distinction supporting the doctrine now contended for. Discovery or conquest are, no doubt, well-recognised titles, from which to deduce, *ab origine*, grants of land, and political government. But these titles carry with them, by their very terms, the idea of possession.

The discoverer, or the conqueror, is the only person in possession; and by force of his possession so acquired, he establishes a government, marks out a territory, or conveys title to the soil. The grant is a contract which the grantor cannot vacate; but it was never doubted, although the case has never come into judgment, that it might be surrendered or abandoned by the grantee. But a corporation, and much more a colony so established by
*682] the *right of conquest or discovery, is not a private, but a public, political institution. To maintain that it was inviolable by the crown, was the doctrine of the patriots of the revolution; but to deny to them the power of abrogating, dissolving, annihilating it, is to bastardize the revolution itself. If the revolution did anything, it was to cancel and annul these royal charters; and the same right of conquest, by which the king of England obtained power to make a political government here, gave to the states the right to destroy it.

In the *Dartmouth College case*, Wheaton's reports, the only important question was, whether the corporation then in question, was a public or private corporation. It was admitted, that in the former case, it was repealable by the state. That a colony was a public institution, and partaking the charter of a corporation, is undeniable. Indeed, Massachusetts was summoned into chancery, as a public corporation, in the year 1684, and judgment rendered to vacate and annul her charter. But the revolution, the declaration of independence, the formation of the constitution of the United States, are acts of higher authority than the decree of the lord chancellor. They dissolved the government of the colony, and the colony itself. The people thereafter claimed and possessed the country by a new title. Sovereign rights were assumed by the states, in their character of public communities, claiming the right of self-government over the soil then in their actual possession; and the territory now claimed by Rhode Island, whatever it was before, then was, in fact and by possession, an integral part of Massachusetts. It was the state, as much as Boston or Salem. All other titles merged, and the charter was at an end.

Neither can the state of Rhode Island claim anything by virtue of a charter granted to the colony of Rhode Island, by the English crown. Rhode Island, by her own act of independence, vacated that charter, and remitted herself to her better title of possession, by which she now holds the towns of Bristol, Warner, Barrington, Somerset, Little Compton, Tiverton, and the fine lands of Mount Hope and Poppy Squash; a territory almost half her actual extent, and unquestionably belonging to Massachusetts, as part of the original colony of Plymouth, which was united in one colony, Massachusetts, in 1691. Baylie's Plymouth, part 4, p. 50; Morton's Memorial 480. For the impossibility of being governed by the charters,
*683] see *Bancroft's Hist. of United States 83–4, 137–8, 209–10, 309, 313, 364; Mass. Hist. Soc. 1st vol. 205, 412, 442, 396; 2d vol. 244.

Some questions may be proposed on this subject, relating to the rights of the complainant, under its assumed title, and the supposed obligation to the respondent, which must be answered, before this cause can proceed to hearing and judgment. Can a sovereign state be sued for acts done in virtue of, or by claim of right, in its sovereign capacity? If Massachusetts had marched across the border supposed by Rhode Island to be the true line, and, in a belligerent attitude, taken possession of the disputed territory; is

such act within the cognisance of this court, subjecting the state to action of trespass, *quare clausum fregit?* If such suit is maintainable, by what law is the action of the court to be regulated, in cases where the constitution lays down no rule of proceeding, where the subject is not within the scope of any treaty, and is not defined by any statute law of congress? If a state may be made amenable to a judicial court, is she to be answerable for the acts of a colony to which she has succeeded? If she is suable, has the state sued, the common rights of other defendants, to plead accord and satisfaction, arbitrament and award, title by prescription, or the bar of any statute or common law limitations? If a state takes all the estate and appurtenances of its colony ancestor, to whom it claims to succeed, is it what such colony had in possession, when it ceased to exist; or may it lay claim to everything to which such colony had a paper title, although disseised by the intrusion of some neighboring state or colony? If a state claims the rights of its colony ancestor, by what rule of what law are such rights to be ascertained? If such rights are of real estate, will such estate pass to the colony, in the first instance, by deed only, or by livery of seisin? If the suit is for sovereignty, or sovereign rights, is there any title to such claim but possession? If, in the case of the South American provinces, the United States delayed to acknowledge their independence and nationality, so long as there was a contest about it, and the possession was not secured; and if such be the principle of the law of nations, is not the same doctrine to prevail, whether this sovereignty is claimed for the whole territory, or for a part of the whole?

But the more significant question remains. Can the allegiance of *5000 American citizens, natives of Massachusetts, and owing her the duties of citizens, or of one such, be changed by a decree of this court, without their consent, without notice to them to agree or disagree, as if they were serfs on the soil of Russia; because 120 years ago, the prodigal monarch of England put his signature to a piece of parchment, to gratify the avarice or the ambition of his courtiers? [*684

The want of jurisdiction is further maintainable, by considerations applicable to his matter, arising both before and subsequent to the decision of the controversy on its supposed merits. The merits of any case depend on the conformity of a party's conduct to a previously prescribed rule of law; but, if there be no such rule, there can be no test of such merit, and no decision upon them. But in addition to this, a question arises on the form of process. By what rule of law can a state be brought before this court, and by what form of execution, known to the laws, can the judgment of this court be carried into effect? It is undeniable, that the power to direct the process, to declare its nature and effect, and the mode in which the judgment of the court shall be executed, must be prescribed by the legislative department. This may be done, possibly, by implication or reasonable inference. It is certain, no such provision is made by direct enactment. In the case of *New Jersey* v. *New York*, 3 Pet. 461, 4 Ibid. 284, where this matter has been considered, it is admitted, that there is no direct provision of law, but the power to summon is made to rest on an analogy to individual suitors. That of execution is not at all considered by the court.

Now, it is contended, that the original analogy that was supposed to exist between sovereign states and private citizens, never did exist; the 11th

article of amendments to the constitution has so declared. Before that amendment, and under the broad extent of power erroneously assumed by this court, a state was, indeed, but in the character of a private corporation; and it might well be thought, on that hypothesis, that the power to try a party by a known rule of law, involved the necessity of having the right to bring such party into court for trial and judgment; and that such power, as it extended to reach other suitors might also reach states, between whom and other suitors, as the court construed the constitution, there was no difference. In the opinion of the dissenting *judge, there was a difference; and when the 11th amendment altered the constitution, so that, to a great extent, this difference is established, the consequence seems legitimately to follow, according to the doctrines maintained by the dissentient. It is now true, that states were once deemed mere ordinary suitors, and that the general provisions of the process act reached states as other suitors, because there was not recognised to be any difference among them. The process act reached only ordinary suitors. States are not now ordinary suitors, and the process acts reaching only to ordinary suitors, do not reach them.

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The power of the courts of the United States, to issue writs not specially provided for, is limited. They are confined to such as are conformable to the principles and usages of law. Judiciary act of 1789. There are no principles of law, meaning the common law, or the statutes of the states, or of congress, that embrace a sovereign state. There is no usage in such cases. On the contrary, the usage is directly adverse. It holds to the exemption of such parties. This difficulty occurred to the complainants. In 1830, the senator from Rhode Island, who signed the bill, as solicitor, in 1832, introduced into the senate a bill, with minute provisions to remedy the defect. It did not pass. In 1828, the senators of New Jersey introduced a like bill to prepare for the controversy of that state with New York. It was not adopted. Every legislator who has been called to consider this subject, has admitted the defect of legislation.

2. This court has no jurisdiction, because of the nature of the suit. It is, in its character, political; in the highest degree, political; brought by a sovereign, in that avowed character, for the restitution of sovereignty. The judicial power of the government of the United States extends, by the constitution, only to cases of law and equity. The terms have relation to English jurisprudence. Suits of the present kind, are not of the class belonging to law or equity, as administered in England. 1 Bl. Com. 230–31; *Nabob of the Carnatic* v. *East India Company*, 2 Ves. jr. 56; *Barclay* v. *Russel* 3 Ves. 435; *Penn* v. *Baltimore*, 1 Ves. sen. 444; where the agreement, and not the political right, was the subject of litigation (See Lord HARDWICKE's opinion); *New York* v. *Connecticut*, 4 Dall. 4. By the judiciary act of 1789, the jurisdiction of the suprime court of the United States, where a state is a party, is confined to cases "of a civil nature."

*This qualification was not in contradistinction to criminal cases, for no state could be prosecuted by another state, as a criminal. It is intended to have reference to cases not political, or involving questions of sovereign power between states. *Wiscart* v. *D'Auchy*, 3 Dall. 325. See also, Drafts of the Constitution, printed for the members of the convention, and for their use only, and the successive amendments made, and in manu-

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script, on said printed drafts; in the collection of the Massachusetts Historical Society.

The complainant has no equity, on his own declaration. It is a stale demand, in the language of the books; and the fact appearing on the face of the bill, need not be pleaded. *Beckford* v. *Wade*, 17 Ves. 87; Story on Equity, § 1520, and notes; *Medlicott* v. *O'Donell*, 1 Ball & Beat. 166; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 629; *Purcell* v. *McNamara*, 14 Ves. 91; *Gifford* v. *Hart*, 1 Sch. & Lef. 406. The court will not permit a party to lie by and wait until the subject of dispute has acquired great value, and become connected with great interests and diversified relations.

Again, if the parties are to be treated in this court as individuals, or private corporations, or even as states with only the rights of private litigants, then the bill must be dismissed; because, if it seeks an adjustment of boundaries, without claim to the soil; such a cause is no subject of equity jurisdiction. *Atkins* v. *Hatton*, 2 Anstr. 386; *Tenham* v. *Herbet*, 2 Atk. 484; *Welby* v. *Duke of Rutland*, 2 Ibid. 391; *Weller* v. *Smeaton*, 1 Bro. C. C. 572; *Bishop of Ely* v. *Kenrick*, Bunb. 322. There is no such case in this country, nor in England, for jurisdiction only, between towns and countries. If the boundary is ascertained, and the defendant has encroached upon the complainant, the right between individuals must be ascertained, in an action at common law, and not by bill in chancery; and the right must, in all cases, be settled at law, before chancery can adjust the boundaries. (See the cases above cited.) The only title, in equity, to which the complainant can appeal, is that by which an equity is administered, not applied to agreements generally, but intended to preserve family honor and family peace. Let this be applied to the sister states, in the great American family of the nation. It will leave undisturbed and unchanged, what has so remained for more than a century. *Stockley* v. *Stockley*, 1 Ves. & B. 30.

**Hazard*, for the state of Rhode Island:—The merits of this motion might have been more satisfactorily examined and discussed [*687 by the complainant's counsel, if we could have had the motion, and the specific grounds of it, put into writing, as we were desirous, and requested that they should be; but without effect. It does appear to me, that a motion which goes to cut off one of the most important branches of the jurisdiction of the supreme court, exercised by it from its first establishment, and to deprive a party in court of the benefit of that jurisdiction, and of her only remedy for aggravated injuries (as she has a right to insist, in resisting a motion which would deprive her of a hearing), that such a motion, and the specific grounds of it, ought to be presented in writing, with precision and fullness, and with adequate notice of them to the opposite party, to enable him to meet them, and to know what he has to meet. But we are now to answer this motion, verbally made, and to seek for the grounds of it, as they are scattered through a long and desultory argument; in the course of which, those grounds have taken so many different shapes, that it is not easy to recognise them for the same, or to reconcile them one with another. This being the case, it is not surprising, that the counsel refused to put the specific grounds of their motion into writing. I have, however, endeavored to make myself acquainted with the real question to be decided; and, with permission, will now present such views as I have been able to take of it.

Has this court jurisdiction over the subject-matter of, and over the parties to, the bill in equity now pending before it? and has the court now power to proceed to the hearing and trial of the cause, and to make a final decree therein? If neither branch of this question can be answered in the negative, there can be no good grounds for the present motion; however those grounds may be shifted, or multipled or repeated. Allow me to consider the first branch of the question. It is evidently purely a constitutional question, arising under the constitution, and only to be tried and settled by it. Turning, then, to the constitution, we find it there declared, that the judicial power shall extend "to controversies between two or more states;" and that in those cases "in which a state shall be a party, the supreme court shall have original jurisdiction." These are the words of the constitution; and this is a controversy between two states; and the state of Massachusetts is a party to it: *and the state of Rhode Island is a party to it: and this controversy is now pending before the supreme court. But it is contended by the counsel, that although the words of the constitution do embrace this controversy, yet it is not within the meaning and intention of that instrument; and that it was the intention of its framers to exclude such controversies from the jurisdiction of the court. This is dealing with the constitution, as Peter, Martin and Jack dealt with their father's will. But as it is the only pretension that could be set up against the constitutional jurisdiction of this court, it is important for us to inquire, strictly, what was the meaning and intent of the framers of the constitution, in this respect? And here, fortunately, nothing is left to conjecture or tradition. The explicit, unequivocal intention of the framers of the constitution upon this subject, is matter of authentic public record.

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I beg leave to trace this constitutional provision for preserving harmony among the states, from its origin. Before the revolution, all controversies between the colonies or provinces, concerning boundaries, were carried up to the king in council, and were by him settled. There was one such controversy between these same parties, Massachusetts and Rhode Island; and another between Massachusetts and New Hampshire; both of which were so settled, When the states asserted their independence, that tribunal, of course, was annulled. But the new states felt the necessity of immediately establishing, in its place, a competent tribunal of their own, with full jurisdiction over those dangerous controversies. And this they did, in the articles of confederation; the ninth article of which provides, that "congress shall be the last resort, on appeal, in all disputes and differences now subsisting, or which may hereafter arise, between two or more states, concerning boundary, jurisdiction or any other cause whatever." Congress to appoint judges to constitute a court for hearing and determining those causes. "And the judgment and sentence of the court to be appointed in the manner before described, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear, or defend their claim or cause, the court shall, nevertheless, proceed to pronounce sentence or judgment, which shall, in like manner, be final and decisive; the judgment or sentence, and other proceedings being, in either case, transmitted to congress, and lodged among the acts of congress, for the security of the parties concerned." And congress did, accordingly, estab-

lish and organize the court, called the "court of appeals." *And that court took cognisance of, and decided a number of jurisdictional controversies between states; and among others, one in which Massachusetts herself was a party, and acknowledged the jurisdiction of the court, and submitted to its decision. It must be recollected, that the territorial descriptions and boundaries, contained in the colonial grants and charters, were necessarily loose and defective; and that in the progress of the settlements, in adjoining colonies, controversies must unavoidably arise as to their respective limits. And the greater the certainty of such conflicts, the greater was the necessity of providing an impartial tribunal for the peaceable adjustment of them. The language of the ninth article, just read, is descriptive of the state of things at the time; "disputes and differences now subsisting, or that may hereafter arise, between two or more states, concerning boundary, jurisdiction," &c. The court of appeals retained and exercised its jurisdiction over these controversies, until the adoption of the present constitution; when its place was supplied, and the exigency provided for, by the establishment of a national judiciary, with full jurisdiction over the same controversies. And by the 12th section of the "act for regulating processes," &c., passed in 1792, it was enacted, "that all the records and proceedings of the court of appeals, heretofore appointed, previous to the adoption of the present constitution, shall be deposited in the office of the clerk of the supreme court of the United States, who is hereby authorized and directed to give copies of all such records and proceedings, to any person requiring and paying for the same, in like manner as copies of the records and other proceedings of the said court are, by law, directed to be given; which copies shall have like faith and credit as all other proceedings of said court."

The counsel of Massachusetts have expressed the idea, that the United States came into existence with the present constitution; and that Massachusetts, as one of them, is bound by nothing before that date. This is a strange conception, indeed. Not only the states, severally, but the United States, came into existence with the declaration of independence; and the first of the articles of confederation ordains, that "the style of this confederacy shall be 'The United States of America.'" It was "to form a more perfect union," and to strengthen the confederation, that the convention was called which formed this constitution. And here are the concluding words of the resolution of the old congress of 1787, *recommending the call of the convention: "For the sole and express purpose of [*690 revising the articles of confederation," &c. The convention met; and in revising the important ninth article, changed the words "disputes and differences," to the word "controversies," taking the words "between two or more states," as they found them in the article. The tribunal was, of course, changed; for now an independent judicial department was established, which had no existence under the confederation. Not deeming it proper, in a permanent constitution, to designate particular, existing, and (it might be hoped,) temporary disputes between states, they used the comprehensive word "controversies," as fully including them all. We do not know that there were any other controversies at the time, between states, than those about boundary; and if there were, they must have been comparatively unimportant; none other were so likely to exist or to be car-

ried to extremities; and therefore, the article, after the words boundary and jurisdiction, merely adds the general expression, "or any other cause whatever;" apparently by way of precaution. The delegates from the several states knew that a number of those state controversies then still existed, and that more might exist; and they were fully sensible how all-important it was to provide against their breaking out. The great object of the convention was (as expressed in the preamble to the constitution), "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." And how was union to exist? How domestic tranquillity, amidst contention among the members? How was justice to be established, if the strong were permitted to give law to the weak? and how were the rights of individual states to be preserved, if left unprotected from the encroachments of stronger neighbors? And what would become of the harmony and integrity of the Union, if all its members were not protected in the enjoyment of their equal rights?

But in addition to all this, it is a remarkable fact, that this very question of jurisdiction, which Massachusetts now brings up, after the lapse of more than half a century, was directly acted upon and decided by the convention itself; as appears from the records of its proceedings. During its deliberations, the question was distinctly brought up, whether controversies between states, concerning jurisdiction and boundaries, should not be excluded from the jurisdiction of the courts. And the convention decided, *691] that they should not be *excluded; and the provision in the constitution, as it then was and still is, was retained; and this constitution was unanimously agreed to by all the delegates. And afterwards, the same question was discussed in the state conventions, and this provision was still retained and approved of; and the constitution ratified by every state. And several years afterwards, when the eleventh amendment to the constitution was adopted, and suits "against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," were excluded from the jurisdiction of the courts, the remainder of the provision, giving jurisdiction over controversies between two or more states, was preserved untouched; and the states thereby manifested their continued approbation of that provision; and accordingly, this question of jurisdiction has long been settled in its court, by its uniform practice and decisions, in numerous cases, from its earliest establishment.

And now, what is it that Massachusetts has to say to all this? I beg the court to consider, whether every single objection, and the whole argument on her part, have not been objections and arguments against the constitution itself, rather than against the constitutional jurisdiction of the court? In opposition to the constitution, they come armed with political axioms, and abstract theories of government; and with the aid of Montesquieu, and other learned writers, reason upon the science of government, and the distribution of appropriate powers among the three great departments.

Allow me, to present a summary of the principal objections and positions upon which the counsel of Massachusetts appear most to rely. They lay it down, that a controversy between states, concerning jurisdiction and boundaries, is political, not judicial, in its character; that judicial courts can take

cognisance only of controversies strictly judicial, not political, in their nature; that the present controversy concerns jurisdiction and sovereignty, and is, therefore, out of the judicial jurisdiction of this court; and cannot be acted upon by it, without the assumption of political power. And in support of their doctrine, the counsel have read a number of English cases, and the opinions of the learned English chancellors. And what does it all amount to? Does it amount to any more than the plain, self-evident proposition, that courts created by sovereign power, and subordinate to it, cannot exercise jurisdiction over sovereign power, nor interfere with its prerogatives? Let us see, if this is not the whole substance of the doctrine. In illustration of their *doctrine, the counsel have referred to the controversies between the colonies, concerning their boundaries, and over which the English courts exercised no jurisdiction. And why did they not? It was, because there was a higher tribunal, which the colonies appealed to. The jurisdiction, in those cases, was in the king himself. He made the colonial grants, and gave the charters; reserving in them, all allegiance and fealty to himself. He appointed the colonial governors; not excepting the governor of Massachusetts. Rhode Island, almost alone, elected her own governors. He, the king, therefore claimed and exercised jurisdiction over the colonies, as their feudal lord. But had he so pleased, he might have transferred his royal jurisdiction over those controversies, to any of his courts. And had he done so, those controversies, whatever their character, and by whatever name called, political or civil, would have become the proper subjects of judicial investigation and decision. Another case, much relied upon by the counsel of Massachusetts, was that of the *Nabob of the Carnatic* v. *East India Company;* of which case, the court of chancery declined taking jurisdiction, because one of the parties was a sovereign prince, and the other (although subjects of the crown) acting by virtue of its charter, as an independent state. It seems, that in this instance, the charter of the company had placed it above the law. But suppose, that its charter had subjected it to the jurisdiction of the court of equity, in any controversies it might have with any of the surrounding princes, would the character of the parties (the foreign prince assenting to the jurisdiction) or the nature of the controversy, have formed any obstacle to the exercise of that jurisdiction? And would not the exercise of it have been strictly judicial in its character? The same plain principles of exposition embrace and dispose of every case and instance which the counsel have brought, or can bring, in support of their doctrine. All these cases are governed by the peculiar institutions of England, and the structure of her government, in its various branches. No such question as this, of jurisdiction in controversies between two states of this Union, ever could arise in the English courts. If this jurisdiction is vested in the court, by the constitution, how preposterous is it to talk of the nature of the controversy, or the character of the parties! Suppose, the controversy is political in its nature: what then? Is there any reason in nature why it should not be subjected to judicial investigation and decision, as much as any other controversy? Suppose, the parties to it are *two states: what then? Is there any reason in nature why they should not be governed by the laws and principles of justice, as much as any other parties? All controversies, whatever their character, and whoever the parties, if they are ever settled, and the parties will not settle them

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amicably, must be settled either by force or by the judgment of some tribunal. When the controversy is between sovereigns, the sword is the last resort, the "*ultima ratio regum*;" and the contest is waged at the expense of the blood and lives of their subjects. But if the controversy is submitted to some independent tribunal; that tribunal, call it by whatever name we may, must act judicially. It is not in my power to perceive, how the sovereignty of Massachusetts is concerned, as she alleges, in the settlement of the question. Even absolute sovereigns have submitted their controversies about territorial limits, to independent tribunals; and no one ever imagined, that the sovereignty of either was affected by their doing so.

But Massachusetts is not now possessed of unlimited sovereignty. All the states, when they ceased to be colonies, became sovereign and independent. But they were all sensible, that they could not remain so; if they remained disunited. They knew, that it was by union alone they could preserve their liberties. They did unite; and to secure their great object, they established this limited government of the Union, investing it with a portion of their state powers, and at the same time, restricting themselves in the exercise of certain other powers. Thus, both the federal government and the state government are but limited governments; both equally bound by the constitution; and all acts of either, violating the constitution, are void. And it is the constitutional province and duty of the court to declare such acts void, whenever the question of their constitutionality comes before it. For in the formation of this federal republican system, an independent judicial department was deemed to be a necessary branch of the government, to prevent encroachments, and preserve a just equilibrium; and therefore, the constitution declares, that "the judicial power shall extend to all cases in law or equity arising under this constitution." And every decision of the court upon the constitutionality of an act, either of congress or of a state legislature, concerns, to use the language of Massachusetts, their respective jurisdictions. How absurd, then, is it, to contend, that the judicial power does not extend to political questions, or to questions in which the jurisdiction *of a state is concerned. The only question here is, whether the states, by the constitution which they formed and adopted, did confer this jurisdiction upon the supreme court. And is it not amply shown, that they did confer it, and that they explicitly declared it to be their intention to confer it?

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And is it for Massachusetts to gainsay this? Massachusetts possessed a larger share of sovereignty under the confederation, than she does under the present constitution. Yet she then agreed and assisted in constituting the court of appeals, with full judicial powers over this very controversy; which was one of the then subsisting controversies concerning state boundaries and jurisdiction, specified in the 9th article. In the convention also which formed the present constitution, Massachusetts agreed to invest this court with the same jurisdiction. And again, in her state convention, which ratified the constitution, she approved of and adopted this provision. And during all this period of time, Massachusetts had subsisting controversies with her neighbor states, concerning her territorial boundaries and jurisdiction; particularly, this controversy with Rhode Island, and another with the state of Connecticut, of precisely the same character; which last was not terminated until the year 1801. Massachusetts, therefore, by her own

consent and acts, gave jurisdiction to this court over the present controversy, so far as her consent and acts could give it.

Taking it, then, for granted, that it is fully shown, that "this court has jurisdiction over the subject-matter of, and over the parties to, the bill in equity now pending before it," I will proceed to the consideration of the 2d question: "Has the court now power to proceed to the hearing and trial of this cause, and to make a final decree thereon?"

BARBOUR, Justice, asked Mr. Hazard, if he could point out any process by which the court could carry a final decree in the cause into effect, should it make one. For instance, if an application should be made by Rhode Island for process to quiet her in her possession, what process could the court issue for that purpose?

Mr. *Hazard* said, that he had by no means overlooked that important question, but had given to it the fullest and most attentive consideration in his power. But he had thought that it would be proper to reserve that question for the last to be considered; as, in point of *order, it appeared to be. At present, he was desirous of showing that the court had [*695 full power, and ought to proceed to the hearing, and to make a final decree in the cause.

And what is there to prevent this proceeding? The court have jurisdiction over the subject-matter and over the parties; and the parties are here before the court. The defendant state obeyed the *subpœna* issued from the court, and came in, more than three years ago, and took upon herself the defence of the suit, and put in her plea and answer thereto. At another term, she applied to the court for an order upon the complainant to reply; and at the last term, she made a written agreement with the complainant respecting amendments of the bill and pleadings; and she is now here in court? What is there to hinder the cause from proceeding?

Why! it is contended, in the first place, that consent of one party cannot give jurisdiction to the court; and authorities have been read to this effect. No one doubts, that when it appears by the record or otherwise, that the court has no jurisdiction of the subject-matter of the complaint, the consent of a party cannot confer jurisdiction. But when the court has jurisdiction of the subject-matter of the suit, the party defendant can consent to appear, and his appearance is conclusive upon him; even although if he had not appeared, he might not have been reached by the process of the court. "The appearance of the defendants to a foreign attachment, in a circuit court of the United States, in a circuit where they do not reside, is a waiver of all objections to the non-service of them." *Pollard* v. *Dwight*, 4 Cranch 421. "An appearance by the defendant cures all antecedent irregularity of process." *Knox* v. *Summers*, 3 Ibid. 496.

But Massachusetts has raised a number of other obstacles to the court's proceeding to a hearing of this cause. The following, I believe, contains the substance of them all: they are, 1. That the sole province of the court is to expound and administer the law; and that here is no law for the court to expound or administer; that congress has passed no act defining the controversy; no act prescribing the rule by which to try it; no rule of decision. 2. That by the 13th section of the judiciary act of 1789, congress has limited the jurisdiction of this court, where a state is a party, to

controversies of a civil nature; which this controversy is not, being political in its character; and that, therefore, congress meant to exclude con-
*696] troversies of this character from the *jurisdiction. 3. Congress has passed no act providing the process necessary to enable the court to exercise its jurisdiction in the case. 4. That the court possesses no power to carry a final decree in this cause into effect, should it make one; congress, as is alleged, having made no law to enable it to do so.

The last of these objections, I will consider, presently, by itself. And as to the rest of them, if this doctrine is to prevail, what becomes of the jurisdiction expressly vested in the supreme court by the constitution itself? and what becomes of the court itself, if it is to be placed upon the same footing as the inferior courts, which congress has power to establish, and, of course, to regulate? By the 8th section, 1st article, of the constitution, congress has power "to constitute tribunals inferior to the supreme court." But the supreme court was ordained by the constitution itself, and necessarily possesses all the judicial powers incident to such a court. Otherwise, the constitution might be defeated, and the supreme court rendered a nullity, by the act of another and but co-ordinate branch of the government. But congress has no power to deprive this court of its constitutional jurisdiction, nor to restrain it in the exercise of that jurisdiction. And this court would declare unconstitutional and void any act of congress having such an object.

The case of *Martin* v. *Hunter's Lessee*, has been referred to, and much stress put upon some general remarks of Mr. Justice STORY, who delivered the opinion of the court in that case. Those remarks were concluded, in the following words, which were not read, but ought to go with them: "We do not, however, place any implicit reliance upon the distinction which has been stated and endeavored to be illustrated." But what shows conclusively that the counsel are wholly mistaken in their understanding of the meaning of those remarks, is the fact, that in the case of *New Jersey* v. *New York*, which was before this court fifteen years after that of *Martin* v. *Hunter*, the court, of which that honorable judge was one, not only took jurisdiction of the case, although the state of New York had refused to appear, but decreed and ordered, that the *subpœna* in this case having been returned executed, sixty days before the return-day thereof, and the defendant not appearing, the complainant be at liberty to proceed *ex parte*.

But it is wasting time, I fear, to dwell upon such objections, when it has been so clearly shown, that these cases were expressly and intentionally
*697] included in the jurisdiction of this court, by the *constitution. I was quite at a loss to understand, what was meant by "a rule of decision; a rule to try the case by;" until the counsel enlightened me by inquiring how, without an act of congress, the court was to ascertain, which state was right, and which wrong; alleging that, there being no such act, the court could not proceed by the rule of the common law, or that of the civil law, or of any state law. This is a novel idea. Such an idea was quite beyond the conception of the men who framed the articles of confederation. It did not enter into their heads, that anything more was necessary to be done, to meet the exigency, than to establish a competent court, with sufficient powers to call the parties before them; and to try and determine

these controversies in the same way as they would any other controversies between any other parties. And it seems, that the court of appeals, thus constituted, had the same idea of its province and duties, and found no difficulty in performing them; governing themselves by the principles and rules of justice, equity and good conscience, and not dreaming that any different rule was furnished by the common law, or the civil law, or by any state law.

The 34th section of the judiciary act has been turned to, again and again, as showing that congress had furnished a rule of decision, as it is called, in cases at common law; but no such rule for cases like the present. This is making a strange use of that short section of four lines, the whole purpose of which is to give efficacy to the local state laws, in trials at common law, in the courts of the United States, "in cases where they apply," says the section: that is, that cases arising under a local law, shall be governed by that law. Thus, the state laws regulating the descent of real estates, or the rate of interest, for instance, ought, in all courts, to govern the cases arising under those laws; and this is the whole meaning of the section. The counsel have contended, that if any suit at all could have been instituted by Rhode Island, it ought to have been a suit at common law and not in equity. But no state law could apply to such a suit any more than to the present; and there are very many suits at common law which are not governed by any state law.

An expression (the word *civil*) used in the 13th section of the same act, is also suspected by the counsel of containing an important secret meaning, which the counsel think they have discovered. They insist, that by the use of this word "civil," congress intended to take this controversy, and all of the same kind, out of the jurisdiction of *this court. Surely, the counsel of Massachusetts must feel themselves under the necessity [*698 of going a great way for inferences, and set a great value upon very slight ones, to draw them from such sources as these. The words relied upon, are "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party," &c. The plain object of congress was, to withhold from the inferior courts, jurisdiction in controversies between two or more states. And to do this, they gave to the supreme court exclusive jurisdiction in those cases, instead of original jurisdiction merely, which it had by the constitution. The word civil is properly used, because all controversies which do or can exist between two or more states, must be of a civil nature, and none other; unless they engage in war, which they have bound themselves by the constitution not to do. The word *civil* does not mean amicable or peaceable; actions of trespass and of ejectment are civil actions. Civil is technically and generally used, in contradistinction to criminal. There is not the slightest ground for supposing, that the word *civil* was intended to be used in contradistinction to *political*. Congress would never have taken so blind a way, so unintelligible and futile, to effect such an object as the counsel of Massachusetts wish to effect. Nor can any such distinction be made. If this is a political controversy, so is it a civil controversy. And if such a distinction could be forced upon the words, it would bring the section to this construction: that the court is left to its original jurisdiction derived from the constitution, in this and other like controversies between states; but

does not take exclusive jurisdiction of them, by virtue of this section of the judiciary act.

But there is another word in the front part of this section, which, in its plain, common-sense meaning, I think, is much more significant than the word which the counsel have endeavored to render so cabalistic. And that is the word *all*—all controversies. This same word, used in another place, has been thought all-important, and great respect has been shown to it by the counsel of Massachusetts. By the constitution, "the judicial power shall extend to *all* cases in law and equity, arising under this constitution," "to *all* cases affecting ambassadors," &c., "to *all* cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, to controversies between two or more states," &c. And b cause the repetition of the word *all* is not not kept up throughout the whole sec-
*699] tion, it is inferred, that the constitution intended to *confer a less extensive jurisdiction in some of the cases enumerated than in others.

Now, congress, in framing the judiciary act, did not deal in such far-fetched inferences. Congress saw no such meaning in that section of the constitution; and therefore, it declares in this same 13th section of the act, "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party." Congress did not intend to alter the constitution. It merely expressed, what it understood to be the meaning of the section referred to. Now, although I have no quarrel with the word *civil*, I should not be willing to give the word *all*, in exchange for it. But why is it that so much effort is used to induce this court to believe that congress is unfriendly to its jurisdiction over these cases? This is not very lawyer-like, nor very respectful to the court. This court will look for its constitutional powers to the constitution itself; and will not allow any other department to construe that instrument for them. In many cases, this court have accurately defined, not only its own constitutional powers and duties, but those of the other departments, legislative and executive, as by the constitution it is authorized and bound to do, on proper occasion. And let me ask, if congress possesses such power over the jurisdiction of this court, why was it necessary for the states themselves to make the 11th amendment to the constitution, for the purpose of taking away the jurisdiction in suits "against one of the states, by citizens of another state, or by citizens or subjects of a foreign state?" But it is not true, that congress is unfriendly to this jurisdiction. There is no single instance in which congress has manifested such a disposition. On the contrary, in this same section of the judiciary act, we find it conferring exclusive jurisdiction, where, by the constitution, the court had only original jurisdiction. And without any appearance of disapprobation, congress has seen this court, from its earliest establishment, exercising its constitutional powers in these cases, and in others in which a state was a party; adopting its rules of practice and proceeding, and its general, permanent orders applicable to them; and prescribing its processes, and the service and return of them, as occasion required.

The third objection is, that congress has provided no forms of process to enable the court to exercise its jurisdiction. This objection, I should think,
*700] was reduced to a very small size. This writ of *subpœna* was issued, served and returned, agreeable to the general *order of the court. And

the defendant state obeyed that process and appeared, took upon herself the defence of the suit; and I understood her counsel to say, that he should not urge any objection to this proceeding of the court. And if Massachusetts had refused to appear, the court would have had it fully in its power to have proceeded in the cause, as it did in that of the state of *New Jersey* v. *New York*. But Massachusetts has appeared, and is now in court. What further process then is now wanting to enable the court to proceed to the hearing of the cause. I know of none. Yet the counsel of Massachusetts still insist that the court cannot go on a step, without an act of congress. Let me then inquire: 1. What has been done by congress upon this subject? 2. What has been done by the court?

1. A judiciary act was passed in 1789, at the first session of congress; and a process act, at the same session, which, with many additions, was rendered permanent by a second process act, passed in 1792. The 13th section of the judiciary act, which gives exclusive jurisdiction to the supreme court in these cases, has already been read. The 14th section enacts, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The 17th section enacts, "that all the before-mentioned courts of the United States shall have power to make and establish all necessary rules for the ordinary conducting business in said courts, provided such rules are not repugnant to the laws of the United States." The process act, 1st section, enacts, that "all writs and processe sissuing from the supreme court, or a circuit court, shall bear test," &c., and shall be signed by the clerk, and sealed with the seal of the court." The 2d section enacts, "that the forms of writs, executions and other process, their style and the forms and mode of proceeding in suits, in those of common law, shall be," &c., "and in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty, respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient; or to such regulations as *the supreme court of the United States shall think proper, from time to time, by [*701
rule, to prescribe to any circuit or district court concerning the same." The 18th, 24th and 25th sections of the judiciary act, first referred to, recognise the power of the court to issue executions upon its judgments and decrees.

Thus much has been done by congress; and it is apparent, that that department has always considered that everything had been done, on its part, necessary to enable the courts to perform all their judicial duties; and fully to exercise all their judicial functions and powers. Congress saw that the courts were proceeding in the exercise of those powers, without difficulty or impediment, and that no further legislative action was called for or needed. And so have the courts thought. In the case of *Wayman* v. *Southard*, 10 Wheat. 1, the court considered itself possessed of full power over the whole proceedings in suits in equity, from their commencement to their final termination by satisfaction of the decrees or judgments.

It has been suggested by the defendant's counsel, that congress has omitted to provide for the exercise of this branch of the jurisdiction of the court, because it did not intend that it should be exercised. This is impeaching the fidelity of congress to the constitution. But, fortunately, the imputation is wholly unfounded. It is alleged also, that congress, by the judiciary act of 1789, has provided rules of proceeding in all, or nearly all, the ordinary cases which can arise at common law, or in admiralty; but none in such cases as this. This is as palpable an error as could well be committed. In the case last mentioned, *Wayman* v. *Southard*, which was a case at common law, objections were made to the process, and to the service and execution of it; and it was contended, that the proceedings were not authorized by any act of congress. But the court, after remarking, that the chancery powers of the court over all the proceedings in suits in equity, from their commencement to their final termination, were unquestionable, proceeded in these words: "It would be difficult to assign a reason for the solicitude of congress to regulate all the proceedings of the court, sitting as a court of equity, or of admiralty, which would not equally require that its proceedings should be regulated, when sitting as a court of common law." Thus, we find, that while the equity powers of the court in these cases is considered as having been placed beyond a doubt, by the acts of congress, its parallel powers, in cases at common law, have required to be sustained by inferences and reasoning. *And it was decided in the last case *702] referred to, and in that of the *United States Bank* v. *Halstead*, 10 Wheat. 54, that these powers are not legislative in their character. They must, then, be simply judicial in their character; and, if necessary, must be incident to the judicial powers and functions.

Let me now inquire, what has been done by the court, in pursuance of its constitutional and legal power. In 1791, the court adopted the following general order, viz: "That this court consider the practice of the court of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary." (1 Cranch xvii.) In 1796, the following permanent general orders, or rules, were established, viz: "1. Ordered that when process at common law, or in equity, shall issue against a state, the same shall be served upon the governor, or chief executive magistrate, and the attorney-general of such state. 2. Ordered, that process of *subpœna* issuing out of this court in any suit in equity, shall be served on the defendant, sixty days before the return day of the said process: And further, that if the defendant, on such service of the *subpœna*, shall not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte*." (Ibid. xviii.) These several general orders or rules are still in full force, and have been practised upon by the court from the time of their adoption. Can there be a doubt, that they are strictly in conformity to the constitution, and the acts of congress referred to? In the case of the *State of New Jersey* v. *State of New York*, 5 Pet. 284, in 1831, the court remark, that "At a very early period of our judicial history, suits were instituted in this court against states, and the questions concerning its jurisdiction and mode of proceeding, were necessarily considered." The court then proceed to review a number of the preceding cases which had been before it, in which a state was a party. "So

early as August 1792 (says the chief justice, who delivered the opinion of the court), an injunction was awarded, at the prayer of the state of Georgia (*State of Georgia* v. *Brailsford*, 2 Dall. 402), to stay a sum of money recovered by Brailsford, a British subject, which was claimed by Georgia, under her acts of confiscation." This was an exercise of the original jurisdiction of the court, and no doubt of its propriety was ever considered.

In February 1793, the case of *Oswald* v. *State of New York*, [*703
*came on. 2 Dall. 402. This was a suit at common law. The state not appearing, on the return of the process, proclamation was made; and the following order entered by the court: "Unless the state appear by the first day of the next term, or show cause to the contrary, judgment will be entered by default against the said state." At the same term, a like order was made in the case of *Chisholm's Executors* v. *State of Georgia;* and at the next term, 1794, judgment was rendered in favor of the plaintiffs, and a writ of inquiry awarded. *Grayson* v. *State of Virginia* (1796), 3 Dall. 320. This was a bill in equity; and it was in this case that the court adopted the two last general orders before mentioned. In *Huger* v. *State of South Carolina*, the service of the *subpœna* having been proved, the court determined, that the complainant was at liberty to proceed *ex parte*. He accordingly moved for, and obtained commissions to take the examination of witnesses in several of the states. 3 Dall. 341. The court also noticed the cases of *Fowler* v. *Lindsay;* and *Fowler* v. *Miller*, 3 Dall. 411; and the case of the *State of New York* v. *State of Connecticut*, 4 Ibid. 1. "It has, then," proceeds Chief Justice MARSHALL, "been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction, in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court, on the failure of the state to appear, after due service, has been also prescribed." And, accordingly, the court did proceed, and made the order, the first part of which has already been read; and which order thus concludes: "And it is further ordered, that unless the defendant, being served with a copy of this decree, sixty days before the next ensuing August term of this court, shall appear on the second day of the next January term thereof, and answer the bill of the complainant, this court will proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill." But before the cause came to a final decree, the state of New York compromised the controversy with the state of New Jersey, to the satisfaction of the latter state. The case now before the court is the same, in character, and in all the principles involved in it, as that of *New Jersey* v. *New York*. *Why should not the court proceed in this case, as [*704
they decided to proceed in that; and in conformity to its subsisting rules and orders?

With permission of the court, I will now proceed to consider the last objection which has been raised by Massachusetts to the jurisdiction of this court; and upon which she appears mainly to rely, for producing an effect upon the minds of the court. That objection is, that should the court make a final decree in the cause, it will have no power to carry it into effect. When the clear and explicit provisions of the constitution are considered, and the several laws subsequently passed by congress, for the purpose of

aiding in the fulfilment of those provisions, I cannot conceive how any doubt can exist, of the power of this court to carry into effect any decree, which, by those provisions, it may be authorized and bound to make. And if the constitution stood alone, I should still entertain the same opinion. It is a universal axiom, that the grant of a principal power, *ipso facto*, includes in it all the minor, subsidiary powers, necessary for the exercise of the main power, as incident to it. What a construction would it be to put upon the constitution, to say, that the people, by that instrument, had ordained and established a tribunal to take cognisance of, and determine, certain enumerated controversies, over which, for that purpose, they had given to it full and express jurisdiction; but that the tribunal so established could not perform its duty, for want of power to cause its decisions to be carried into effect? What would the people have a right to say to a tribunal which should render to them such an account of its services; or, rather such an excuse for the neglect of its duty?

But it is not important here to inquire, whether, in considering the present question of jurisdiction of this court to hear, try and make a final decree in this cause, it can be at all necessary or useful to inquire, what further powers the court may, or may not exercise upon any future, distinct application, which may, or may not, be hereafter made to the court; and upon which new and distinct application, should any such be made, the court will then decide as it shall deem right. If, by the constitution and existing laws, the court have jurisdiction over this cause, to hear, try and decide it; is it not bound to exercise that jurisdiction, when appealed to: and ought the court to decline exercising this unquestioned jurisdiction, from an apprehension that, possibly, it may, hereafter, be asked to do something more, which, possibly, it may not have it in its power to *do? In the case of *New Jersey* v. *New York*, the court said, that, "inasmuch as no final decree has been pronounced, or judgment rendered in any suit heretofore instituted in this court against a state; the question of proceeding to a final decree, will be considered as not conclusively settled, until the cause shall come on to be heard in chief." Thus, the court determined to hear the cause in chief, without anticipating what its final decree might be; much less, what, if anything, might remain to be done, after the decree. And the court did then decree, "that the complainant be at liberty to proceed *ex parte*;" and further decreed, that "unless the defendant state appeared, the court would proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill." There are many cases in which decrees in chancery cannot be fully, if at all, executed; but that has never been considered a reason why the court should not pronounce the decrees which it has the power to pronounce.

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But I shall not dwell longer upon these questions; because there is another position which, if should, I think, entirely obviates the objection of the want of power in the court beyond the power making a final decree in the cause. That position is, that the pronouncing of a final decree in the cause will complete the exercise of all the jurisdiction which the cause can require; and will be a final, conclusive and permanent termination of the controversy. This position, upon much reflection, I believe to be sound, or I certainly should not venture to advance it before this honorable court; as I do, entirely upon my own responsibility, as to its soundness or unsound-

ness. A final decree in this cause will have no resemblance to a judgment of court for a sum of money, to be collected on execution; nor to a judgment in ejectment, to be followed by an execution for possession. No process would necessarily follow a final decree in this cause. We ask no damages of Massachusetts; no delivery of possession; no process to compel her to do or undo anything. All we ask is a decree, ascertaining and settling the boundary line between the two states.

THOMPSON, Justice, asked Mr. Hazard, if the bill did not contain a further prayer; a prayer that Rhode Island might be restored to her rights of jurisdiction and sovereignty over the territory in question; and quieted in her enjoyment of them? And that part of *the bill being read, it appeared, that it did contain such a prayer, in addition to the prayer [*706 that the boundary line between the two states might be ascertained and established.

Mr. *Hazard* said, that the latter part of the prayer of the bill had escaped him; but it did not vitiate the bill. The court would have it in its power to grant so much of the prayer as they might think right. All Rhode Island asked for was a decree ascertaining and establishing the true boundary line between her and Massachusetts. When that is settled by a decree, the rights of jurisdiction and sovereignty will necessarily follow: the decree will execute itself; and this controversy can no longer exist. When the boundary line is settled, it will be the same as all other established boundary lines; and the relative situation of Rhode Island and Massachusetts will be the same as that of all other adjoining states. And why should not Rhode Island be placed upon the same footing, in this respect, with her sister states? Why should her jurisdictional boundary line be left in dispute, and she exposed to encroachments; when all other controversies of this kind have been lastingly settled?

Am I not sustained in the position I have here taken, by the opinions and acts of the learned men who framed the articles of confederation? They enacted, that the decrees of the court of appeals, in the cases over which jurisdiction was given to it, should be final and conclusive. And it was their opinion, that nothing more than a final decree would be necessary; and therefore, they provided for no further proceedings. And what ought to be conclusive, is the fact, that although a number of decrees in such cases were made by the court of appeals; no difficulty was ever experienced, and no further process was ever found to be necessary.

It is true, that after the line is settled, Massachusetts may do other wrongs to Rhode Island, for which other remedies may be necessary; and so she may to any other state; but this controversy about the line will be at an end. Should Massachusetts hereafter encroach upon Rhode Island, that will be a new aggression; the same as if she should encroach upon any other state, near or distant; the same as if she should encroach upon the state of New York, or Connecticut or New Hampshire; or again, upon Rhode Island, on her eastern boundary; with all of which states Massachusetts has had controversies about her boundaries, and has always been found the aggressor. But when those boundaries were ascertained by the competent *tribunals, all difficulties were at an end. When Rhode [*707 Island, upon the decision of the king in council, received under her

jurisdiction, her county of Bristol, and her towns of Tiverton and Little Compton, over which Massachusetts had long exercised jurisdiction, she met with no obstructions from that state. Neither did New Hampshire, whose controversy with Massachusetts was decided by the same tribunal. Still the court are told by Massachusetts, that they cannot carry their decree into effect. Allow me to ask, in what possible way Massachusetts can have it in her power to defeat or evade the effect of that decree? The decree itself, the moment it is pronounced, will establish a new state of things between Massachusetts and Rhode Island. And what are the means that Massachusetts can resort to, to prevent that decree from taking full effect, by its own force and operation? I should be glad to hear the attorney-general of Massachusetts inform the court, what it is that that important state is going to do, to set the decree of this court at defiance, and render it a nullity? Massachusetts is not going to erect a line of batteries along this strip of land; nor to station a military force there, to take hostile possession of it. If she should, it would be invasion; an ample remedy for which is provided in the 4th article 4th section of the constitution. And Rhode Island would be under no necessity to apply to this court for an injunction in such a case. And this again shows the meaning and propriety of the expression "civil controversies," used by congress; and, no doubt, meant by the constitution. I ask again, then, what can Massachusetts do to prevent a decree of this court taking full effect by its own force and operation? She can do nothing. She can only say, that she will retain jurisdiction over this district, the decree notwithstanding. But let us examine what she can make this amount to. Massachusetts, as a state, is not the proprietor of this strip of land. If she own any land there, she will, of course, still own and retain it; and her right and title will be held as sacred as those of any other owners of the soil. There is no shire town within the district; and of course, probably, no public buildings belonging to the state. If there are, they will still be her property, though not appropriated to the same uses. There will be nothing, therefore, which Massachusetts can retain the possession of, which she will be required to relinquish. Jurisdiction over the district it will be out of her power to exercise, for she will not have it; that (in her) will be extinguished by the decree, *ipso facto*. What jurisdiction, after the decree, can *she exercise? She cannot number the inhabitants of this district as part of her population or of her militia; for they will not be so, any more than the inhabitants of the county of Providence. And no more can she tax them, or their lands, or other property; for they will not be subject to her laws. Her tax-gatherers can collect no taxes; her ministerial officers execute no process, within that district, for it will be out of the jurisdiction of their state. And should they attempt to do so, they will carry no Massachusetts authority with them over the boundary line established by the decree of this court. They will be trespassers; and subject themselves to the penalties provided for the punishment of trespassers. With as much right might Massachusetts send her officers into any other part of the state as this. But the civil authorities of Rhode Island would have no difficulty in dealing with such offenders. They would be violators of the laws of the land; not only of the laws of Rhode Island, but of the constitution of the United States, and of the acts of congress, under the authority of which the decree

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of this court would have been made. They could not escape conviction and punishment. And any countenance Massachusetts might give to them, would but aggravate the offence and the punishment. No aid from this court would be needed. The existing laws would furnish a perfect remedy for the wrongs attempted to be done.

Those Massachusetts' officers, sheriff, tax-gatherers, or whatever they might be, would have no authority to demand aid from the people of the adjoining county in Massachusetts. Nor is it probable that any of those people (not being bound to obey such demand) would have any concern in violating the rights of another state, established by a decree of the supreme court of the Union. But should those officers, on any occasion, carry with them a sufficient body of men from Massachusetts, to enable them, for the time, to seize upon the property or persons of any of the inhabitants of the state of Rhode Island (of which this district would then be a part); and to escape into Massachusetts before they could be arrested, they would all alike be criminals, and punishable as such. And by the fourth article, second section, of the constitution of the United States, and that of congress passed in conformity thereto, the executive authority of the state of Massachusetts, on demand made by the executive authority of the state of Rhode Island, would be bound and compelled to deliver up those criminals, to be removed for trial to the state having jurisdiction of the crime. And here again, Rhode *Island would have a perfect remedy, without the interposition of this court. Nor would Massachusetts have it in her power, effectually, to obstruct the magistrates and civil officers of Rhode Island in the execution of their official functions. Those magistrates and officers, in the performance of their lawful duties, within the jurisdiction, and under the authority of their own state, would have nothing to apprehend from any quarter. Should any of them be lawlessly seized, and carried within the jurisdiction of Massachusetts, still they would have nothing to apprehend. The decree of this court, the laws of the state in which they acted, and the constitution and laws of the United States, would sustain and save them harmless. These authorities, the respectable judicial tribunals of Massachusetts, would not set at defiance; and if they should, their judgments and proceedings would speedily be revised and corrected here. Thus, we find, that it would be wholly out of the power of Massachusetts, to prevent a final decree of this court from taking full effect, by its own force and operation. [*709

I could not help feeling great surprise, when I heard the attorney-general of Massachusetts so solemnly and portentously warning this court of consequences, and expressing his anxious hopes, that if it should decide against Massachusetts, it will, for the honor of the court, and for the honor of the country, be sure to find some way to execute its decree. What! Does Massachusetts threaten? Is Massachusetts ready to become a nullifying state? and to set up her own will, in defiance of the decrees of this court, and of the constitution itself? This court will not make a decree against Massachusetts, unless it shall be satisfied that the constitution authorizes it, and that equity requires it. And for Massachusetts to expect to prevent the court from making such a decree as it may deem constitutional and equitable, by telling the court how formidable she is, and how contumacious and lawless she means to be in her defiance of its decrees; this, it appears

to me, is almost as deficient in policy, as it is in modesty. But let Massachusetts take her own course, and whatever that may be, it will excite no apprehension in Rhode Island; although she may grieve that so noble a state should conduct in such a manner as to tarnish her high and well-merited renown.

If the principles and positions I have endeavored to establish are sound, and have been established, I must think that they reach and dispose of all the material objections which the counsel of Massachusetts has raised against the jurisdiction of this court. *There were a great number of *710] other objections, or suggestions and statements made by the counsel, some of which I will now just advert to; although I do not consider them as having any bearing upon the question before the court.

It is alleged, that the 5000 inhabitants of the district in question (I know not how many there are) have a right to be parties to this suit, and are not. If this was so, it would be no objection to the jurisdiction of the court. The court would take care that they were made parties, before it proceeded further. But all the proper parties are here in court. This controversy is about state jurisdiction, not titles to soil and freehold. I suspect, however, that if those inhabitants were consulted, they would not consent to be made defendants; but would rather join with the complainant state. They are taxed hard in Massachusetts, and would have no state taxes to pay in Rhode Island. And at one time, a very large number of the respectable inhabitants of that district, petitioned the legislature of the state of Rhode Island to be received into that jurisdiction, to which they claimed rightfully to belong.

It is objected also, 1. That the bill contains matter in bar to itself. 2. That the bill admits that Rhode Island was never in possession, and that the suit is barred by prescription. 3. That the controversy has been settled. These might be proper matters for discussion and proof (they are not proved yet, and cannot be, for not one of them is true), upon the trial of the cause; but, evidently, have nothing to do with the question of jurisdiction. Because it appeared, that the Massachusetts charter of 1628, upon a *scire facias* from the court of king's bench, was revoked and annulled in 1685; and that she did not get a new charter until 1691; her counsel has stated, that Rhode Island, while a colony, abandoned and surrendered up her charter. This is a mistake. Connecticut and Rhode Island never did surrender their charters; although they were demanded, and great efforts made to obtain possession of them. The Connecticut charter was hidden in the hollow of the venerable old oak tree at Hartford; and that of Rhode Island was also preserved, secure from its enemies, and is now in her secretary's office at Providence. The counsel (in sport, I suppose) has indulged his fancy in describing Rhode Island as she would have been, had the claims upon her territory, set up by Plymouth on the east, and Connecticut on the west, been successful. Very true; and Rhode Island would have been stripped indeed; especially, with Massachusetts helping herself to five miles more of her territory on *the north, which I suppose the *711] attorney-general of Massachusetts thinks was quite venial, while Rhode Island's territory was looked upon as free plunder. But those claims upon the territory of Rhode Island, on the east and west, were found and decided to be unjust. And it was Massachusetts herself, not Plymouth, which had gotten possession of the county and towns within the limits of

Rhode Island, as before mentioned, and from which, after a faint struggle, she was compelled to retreat. There is no probability, that a small state will make unreasonable claims, much less encroachments upon large ones.

The counsel of Massachusetts have asked the court to consider the character of the original colonial charters, and have read passages from Bancroft's History, to show how loose and defective those charters were, and how difficult it would now be, to decide controversies growing out of them. That a case will be a difficult one to settle, is not a very good reason to offer for a court's not taking cognisance of it. But in the present case, no difficulty whatever can arise from such a source. The charters both of Rhode Island and Massachusetts are clear and intelligible in this particular. Rhode Island, by her charter, is bounded north by the south line of Massachusetts; and that line, by the Massachusetts charter, was to be three miles south of the most southerly part of Charles river; the sole question, therefore, to be settled, is a question of construction of that part of the Massachusetts charter. One set of the Massachusetts commissioners appointed to settle this line with Rhode Island, reported correctly to their legislature, the construction which each state relied upon. The Rhode Island construction was, that the most southern part of Charles river proper—Charles river itself, that is, what was known by the name of "Charles river," was the point from which to measure off the three miles. On the other hand, Massachusetts insisted, that the most southerly source or spring head of any run of water, running northerly and finding its way into Charles river, was to be taken as the most southerly part of Charles river. And accordingly, they found a brook, called Mill brook, which ran from the south into Charles river. This they traced up to a pond, called "Whiting's Pond," out of which the brook run; then going to the south end of the pond, they found another brook, called Jack's Pasture brook, which they traced up south to its spring head, and this they called the most southerly part of Charles river. Surely, there can be no difficulty in deciding by the charters, which of these constructions is the correct one. These are the merits of the case, *and I am sensible that they have no bearing upon the question of jurisdiction before the court. But the counsel of Massachusetts have repeatedly introduced the merits; and I presume, it is not improper for me to follow him so far as to state them correctly. [*712

Precisely the same question was decided more than an hundred years ago, in the controversy between Massachusetts and New Hampshire. The northern boundary of Massachusetts is defined and limited in her charter, in the same terms as her southern boundary. She was to have three miles north of the most northerly part of the Merrimack river. Upon this she set up the same claim upon New Hampshire, as she now does upon Rhode Island; and by her construction, she would have taken the whole of New Hampshire, and the greater part of the province (now state) of Maine. But her pretensions were decided to be wholly unfounded and unjustifiable; and she was compelled to draw herself within her charter limits. And why has she not respected that decision, and contented herself with the same limits on the south as on the north?

Massachusetts also had precisely the same controversy with the state of Connecticut, about the westerly part of this same line; that state and Rhode Island, by their charters (granted about the same time, 1662–3), being

both bounded northerly upon the same straight line, to be drawn due east and west throughout. But Connecticut would not submit to the encroachments of Massachusetts. And although she had entered into a written agreement with her, establishing the line as it then was; and that agreement had been formally ratified and confirmed by the legislatures of both states (which was never the case with us); yet Connecticut proved, that misrepresentations and impositions had been practised upon her commissioners and government, in the running of that line; and she brought Massachusetts to a sense of justice, and obtained from her a large part, and not the whole of the territory which the latter had wrongfully taken within her limits. And now, whenever you look upon any map including the three states, or that part of them, you see the Connecticut northern line is miles in advance of that of Rhode Island, which ought to be a continuation of it; and the government of Massachusetts has not caused, and cannot cause, any survey or map of that fine state to be taken or published; without recording anew and emblazoning her unjust encroachments upon Rhode Island.

A singular appeal was made to your honors, in the gentle tones of persuasion, by the counsel of Massachusetts. They remind the court *that
*713] courts of equity do not countenance family quarrels, in which the honor and feelings of families may be exposed to injury. Very well. And here is the important state of Massachusetts, surrounded by six other states, all of which show her great respect and deference, and manifest a desire to continue in strict harmony with her. But Massachusetts is not satisfied with this. She encroaches, and encroaches, upon her neighbors, until their patience is exhausted; and after long forbearance, they are compelled, one after another, to complain of her aggressions and seek redress. And thus called upon, here comes Massachusetts, quite undisturbed, and to smooth matters over, talks about family disputes, and family honor, and the relations between neighboring sister states, which make it improper to listen to their trifling complaints against each other; and so she advises that the complainants be reprimanded and sent home. But this did not answer before the old tribunal of the king in council, nor before the American court of appeals. Rhode Island, the last of the injured states, whose grievances alone remain unredressed, entertains a high respect for her elder sister, Massachusetts. But I take it upon myself, to assure this honorable court, should it think itself bound in justice to make a decree in her favor, she will not be offended nor complain of it; although the decree must be against that respected elder sister.

Allow me to conclude my remarks, more seriously, and with matter more important. The counsel of Massachusetts have talked much of the proper division of powers between the three great departments of government; the legislative, executive and judicial. And they insist, that the judicial is not the proper department to have cognisance of these controversies. Pray, have you heard them point out which of the other departments is the proper and appropriate one? or what other tribunal there is to exercise this jurisdiction? The idea of investing the executive with jurisdiction over controversies of any kind, whether political or civil, between states or individuals, has never entered into the head of any man. And is it not evident, that jurisdiction over such controversies cannot consistently be exercised by the legislative department of any well-balanced government? And when the

structure of the federal and state governments, relatively to each other, the partition, limitation and adjustment of their respective powers is considered, the incompatibility of such a legislative jurisdiction is still more glaring. And therefore, the constitution of the United States has not permitted *the exercise of any such jurisdiction to either the legislative or executive department; but has expressly conferred it upon the [*714
judiciary, which is free from all the objections that lay against the other two. What then does Massachusetts mean? Does she mean, that in her controversies with any of her sister states, she is not amenable to justice, before any tribunal? And that there is no remedy for an injured sister state, for any wrongs she may suffer at her hands? That there shall be no wrong without a remedy, is a first principle, an axiom in all free governments. Is this the country in which that great fundamental principle of right and justice is to be first abandoned?

Baldwin, Justice, delivered the opinion of the court.—At the January term of this court 1832, the plaintiff filed a bill in equity, presenting a case arising under the various charters from the crown of England to the Plymouth company, in 1621; to Massachusetts in 1629; to Rhode Island in 1663; the new charter to Massachusetts in 1691; together with sundry intermediate proceedings of the council of Plymouth; the result of which was to vest in the colony of Massachusetts and the king, all the rights of propriety and government previously granted to that company as a political corporation. The bill also set out the repeal of the original charter of Massachusetts on a *scire facias* in the court of chancery in England, the grant by the crown, and acceptance by the colony, of a new charter, subsequent to the charter to Rhode Island. All these acts are specially and at large set out in the bill, but need not in this stage of the cause be referred to by the court in detail. They present the claim of the plaintiff to the territory in controversy between the two states, in virtue of these charters, according to the boundaries therein described.

Independently of the claim under the charter of 1663, the plaintiff asserts a previous right, in virtue of grants from the Indians, and settlements made under a title thus acquired; and also asserts, that under both titles, the inhabitants of Rhode Island made settlements on the lands immediately south of the boundary between the two colonies as now asserted; which settlements were so made and continued, from the time of the purchase from the Indians, before, under the charter, and afterwards, though the line was not defined and disputed.

The bill then proceeds to state the existence of controversies between the two colonies, at a very early period; to settle which, commissioners *were appointed by each colony in 1709, and at various other periods [*715
down to 1809; and sets forth the proceedings of the commissioners of the colonies before the revolution, and the states afterwards, down to 1818.

For the present purposes of this case, it is necessary to refer only to one subject-matter of these proceedings during this whole period, which is presented in the bill in the same aspect throughout: that subject is the agreement of 1709 and 1718, and the acts done pursuant thereto, which are recited at large in the bill. It there states the agreement of the commissioners of

the two colonies that a line should be run and marked as their boundary, which was done; a survey made and returned, together with all the proceedings, to the legislatures of the respective colonies, accepted by Massachusetts, but as the bill avers, not accepted and ratified by Rhode Island. This is the line now claimed by Massachusetts; and whether the charter line or that, is the true line of right and boundary between the two states, is the only point in controversy in this case.

The bill avers, that this line was agreed on, in consequence of a representation by the Massachusetts' commissioners to those of Rhode Island, that in 1642, Woodword and Saffrey had ascertained the point three miles south of Charles river; which, by the charters of both colonies, was to form their common boundary, by a line to run east and west therefrom. That Woodword and Saffrey had set up a stake at that point on Wrentham Plains, as the true southern boundary of Massachusetts. That the Rhode Island commissioners, confiding in such representation, believing that such point had been truly ascertained, and that such stake was no more than three miles from Charles river, south, entered into and made the agreement of 1710–11, which was executed by the commissioners on both sides. In the agreement in this clause: That the stake set up by Woodword and Saffrey, approved artists, in 1642, and since that often renewed, in lat. 41° 55′ N., being three English miles south of Charles river, in its southernmost part, agreeably to the letters-patent to Massachusetts, be accounted and allowed as the commencement of the line between the colonies, and continued between them as decyphered in the plan of Woodword and Saffrey, on record in the Massachusetts government.

It is then averred in the bill, that no mark, stake or monument, then existed (1710–11), by which the place at which Woodword and Saffrey were alleged to have set up the stake could be ascertained; that *none of *716] the parties to the agreement went to such place; that no survey was made, no line run, nor any means taken to ascertain were it was; whether it was three miles or more from Charles river; whether Woodword and Saffrey ever ran the line, or whether it was the true boundary line between the colonies, according to their respective charters. That Massachusetts took wrongful possession of the territory in question, in which Rhode Island never acquiesced, and to which she never agreed; but continued to assert her claim, from the time of the agreement, to the filing of the bill, to all the territory embraced in her charter, and sovereignty and jurisdiction within and over it, as claimed in the bill. The bill denies, that any line was ever run by Woodword and Saffrey, in 1642; avers that the agreements of 1710–11, which adopted it, were unfair, inequitable, executed under a misrepresentation and mistake as to material facts; that the line is not run according to the charters of the colonies; that it is more than seven miles south of the southernmost part of Charles river; that the agreement was made without the assent of the king; that Massachusetts has continued to hold wrongful possession of the disputed territory, and prevents the exercise of the rightful jurisdiction and sovereignty of Rhode Island therein. The prayer of the bill is to ascertain and establish the northern boundary between the states, that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs, and they be quieted in the enjoyment thereof, and their title; and for other and further relief.

On the service of this bill on the governor and attorney-general of Massachusetts, agreeable to a rule of this court, the legislature passed a resolution, authorizing the appearance of the state to the suit, and the employment of counsel by the governor, to defend the rights of the state. In obedience to this resolution, the governor, after reciting it, appointed counsel, under the seal of the state, to appear and make defence; either by objecting to the jurisdiction of this court, or by plea, answer or otherwise, at his discretion, as he should judge most proper. Under this authority, an appearance was entered, and at January term, a plea in bar of the plaintiff's bill was filed, in which it was averred:

That in 1642, a station or monument was erected and fixed at a point believed to be on the true southern boundary line of Massachusetts, and a line continued therefrom to the Connecticut river, westwardly; which station or monument was well known, notorious, and has ever since been called Woodword and Saffrey's *station, on Wrentham Plains. It then sets up the agreement of 1709, and subsequent proceedings at large; [*717 avers that the whole merits of plaintiff's case, as set forth in the bill, were fully heard, tried and determined, in the hearing and by the judgment of the Rhode Island commissioners; that the agreement was fair, legal and binding between the parties; that it was a valid and effectual settlement of the matter in controversy; without covin, fraud or misrepresentation, with a full and equal knowledge of all circumstances by both parties. That such agreement is still in full force, no way waived, abandoned or relinquished; and that the defendant has held, possessed, occupied and enjoyed the land, propriety and jurisdiction, according to the well-known and easily discovered station of Woodword and Saffrey, and the line run by them therefrom, from the date of the agreement to the present time, without hindrance or molestation. The plea then sets forth the subsequent agreement of the two colonies, in 1717 and 1718, touching their boundaries, and a running and marking thereof by their respective commissioners, appointed for the purpose of finally settling the controversy; who, in 1718, agreed that the stake of Woodword and Saffrey should be the point from which the dividing line should be run, and be for ever the boundary between the two governments, notwithstanding any former controversy or claim. That this agreement was recorded, ratified and confirmed by the general assembly of Rhode Island; that no false representation was made to their commissioners; that the agreement was concluded fairly, in good faith, with full and equal knowledge by the respective parties, has never been annulled, rescinded or abandoned, and was in pursuance and completion of the agreement of 1709. The report of the commissioners is then set out, stating, that in 1719, they ran and marked a line, west 2° south, from the stake of Woodword and Saffrey at which they met, as the boundary; which report was approved by Rhode Island in the same year. The plea then makes the same averment as to these proceedings of 1717, 1718 and 1719, as it did in relation to those of 1709, 1710 and 1711; pleads both agreements, and unmolested possession by the defendant, from their respective dates to the present time, as a bar to the whole bill, and against any other or further relief therein; prays the judgment of the court whether the defendant shall make any further answer to the bill, and to be dismissed. Then the defendant, not waiving, but relying on his plea, by way *of answer, and in support of the plea [*718

as a bar to the bill, avers that both agreements were a valid and effectual settlement of the whole matter of controversy in the case, as is insisted on in the plea.

To this plea, a replication was put in, but afterwards withdrawn, and notice given that the cause would be set down for hearing on the plea; the cause was continued at the last term; the plaintiff gave notice that he should at this term move to amend the bill; and the case is now before us for consideration, on a motion by the defendant, to dismiss the bill for want of jurisdiction in the cause.

However late this objection has been made, or may be made, in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extra-judicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it. 6 Pet. 709; 4 Russ. 415; 3 Pet. 203–7.

A motion to dismiss a cause pending in the courts of the United States, is not analogous to a plea to the jurisdiction of a court of common law or equity in England; there, the superior courts have a general jurisdiction over all persons within the realm, and all causes of action between them. It depends on the subject-matter, whether the jurisdiction shall be exercised by a court of law or equity; but that court, to which it appropriately belongs, can act judicially upon the party and the subject of the suit; unless it shall be made apparent to the court, that the judicial determination of the case has been withdrawn from the court of general jurisdiction, to an inferior and limited one. It is a necessary presumption, that the court of general jurisdiction can act upon the given case, when nothing appears to the contrary; hence has arisen the rule, that the party claiming an exemption from its process, must set out the reasons, by a special plea in abatement; and show that some inferior court of law or equity has the exclusive cognisance of the case; otherwise, the superior court must proceed, in virtue of its
*719] general *jurisdiction. This rule prevails both at law and in equity. 1 Ves. sen. 204; 2 Ibid. 307; Mitf. 183. A motion to dismiss, therefore, cannot be entertained, as it does not and cannot disclose a case of exception; and if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. A plaintiff in law or equity, is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ, or dismiss a bill for such cause, he must give the plaintiff a better one, and shall never put in a second plea to the jurisdiction of that court, to which he has driven the plaintiff by his plea. 1 Ves. sen. 203. There are other classes of cases where the objection to the jurisdiction is of a different nature, as, on a bill in chancery, that the subject-matter is cognisable only by the king in council, and not by any judicial power (1 Ves. sen. 445); or that the parties defendant cannot be

brought before any municipal court, on account of their sovereign character, and the nature of the controversy (as 2 Ves. jr. 371, 387; 1 Ibid. 56, 60); or in the very common cases which present the question, whether the cause properly belongs to a court of law or equity. To such cases, a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court; the objection goes to a denial of any jurisdiction of a municipal court, in one class of cases; and to the jurisdiction of any court of equity or of law, in the other; on which last, the court decides according to the legal discretion. An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue (10 Pet. 473; *Toland* v. *Sprague*, 12 Ibid. 300); but when the objection goes to the power of the court over the parties, or the subject-matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill. Where no inferior court can have jurisdiction of a case in law or equity, the ground of the objection is not taken by plea in abatement, as an exception of the given case, from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, or at the trial or hearing, unless it goes to the manner of bringing the defendant into court, which is waived by submission to the process.

As a denial of jurisdiction over the subject-matter of a suit between parties within the realm, over which and whom the court has power to act, cannot be successful in an English court of general jurisdiction, *a motion like the present could not be sustained, consistently with the [*720 principles of its constitution. But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is *coram non judice*, and its action a nullity. 10 Pet. 474; S. P. 4 Russ. 415. And whether the want or excess of power is objected by a party, or is apparent to the court, it must surcease its action, or proceed extra-judicially.

Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. So they have been considered by this court, through a long series of years and cases, to the present term; during which, in the case of the *Bank of the United States* v. *Daniel*, this court has declared this to be a fundamental principle of the constitution; and so we shall consider it in deciding on the present motion. 2 Pet. 590–1.

Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plentitude unimpaired by any act, and controllable by no authority (6 Wheat. 651; 8 Ibid. 584, 588); adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution, it was ordained, that this judicial power, in cases where a state was a party, should be exercised by this court as one

of original jurisdiction. The states waived their exemption from judicial power (6 Wheat. 378, 380), as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified. Massachusetts has appeared, submitted to the process in her legislative capacity, and pleaded in bar of the plaintiff's action, certain matters on which the judgment of the court is
*721] asked; *all doubts as to jurisdiction over the parties are thus at rest, as well by the grant of power by the people, as the submission of the legislature to the process; and calling on the court to exercise its jurisdiction on the case presented by the bill, plea and answer.

Our next inquiry will be, whether we have jurisdiction of the subject-matters of the suit, to hear and determine them. That it is a controversy between two states, cannot be denied; and though the constitution does not, in terms, extend the judicial power to *all* controversies between two or more states, yet it in terms excludes *none*, whatever may be their nature or subject. It is, therefore, a question of construction, whether the controversy in the present case is within the grant of judicial power. The solution of this question must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the constitution. It was necessarily left to the legislative power to organize the supreme court, to define its powers consistently with the constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the constitution, congress exercised their power, so far as they thought it necessary and proper, under the seventeenth clause of the eighth section, first article, for carrying into execution the powers vested by the constitution in the judicial as well as all other departments and officers of the government of the United States. 3 Wheat. 389. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power (1 Wheat. 326; 4 Ibid. 407), leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers, except their own. The distribution and appropriate exercise of the judicial power must, therefore, be made by laws passed by congress, and cannot be assumed by any other department; else, the power being concurrent in the legislative and judicial departments, a conflict between them would be probable, if not unavoidable,
*722] under a constitution of government *which made it the duty of the judicial power to decide all cases in law or equity arising under it, or laws passed, and treaties made by its authority.

By the judiciary act of 1789, the judicial system of the United States

was organized, the powers of the different courts defined, brought into action, and the manner of their exercise regulated. The 13th section provided, "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states or aliens; in which latter case, it shall have original, but not exclusive jurisdiction." (1 U. S. Stat. 80.) The power of congress to make this provision for carrying into execution the judicial power in such cases, has never been, and we think cannot be, questioned; and taken in connection with the constitution, presents the great question in this cause, which is one of construction appropriate to judicial power, and exclusively of judicial cognisance, till the legislative power acts again upon it. See 3 Pet. 203. In deciding whether the present case is embraced or excluded by the constitution and judiciary act, and whether it is a case of lawful original cognisance by this court, it is the exercise of jurisdiction; for it must be in the legal discretion of the court, to retain or dismiss the bill of the plaintiffs. Act as we may feel it our duty to do, there is no appeal from our judgment save to the amending power of the constitution; which can annul not only its judgments, but the court itself. So that the true question is, necessarily, whether we will so exercise our jurisdiction as to give a judgment on the merits of the case, as presented by the parties, who are capable of suing and being sued in this court, in law or equity, according to the nature of the case and controversy between the respective states.

This court, in construing the constitution as to the grants of powers to the United States, and the restrictions upon the states, has ever held, that an exception of any particular case, pre-supposes that those which are not excepted are embraced within the grant or prohibition; and have laid it down as a general rule, that where no exception is made in terms, none will be made by mere implication or construction. 6 Wheat. 378; 8 Ibid. 489–90; 12 Ibid. 438; 9 Ibid. 206, 207, 216. Then, the only question is, whether this case comes within the rule or presents an exception, *according to the principles of construction adopted and acted on by this court, [*723 in cases involving the exposition of the constitution and laws of the United States, which are construed as other instruments granting power or property. 12 Wheat. 437; 6 Pet. 738, 740. That some degree of application must be given to words, is a proposition of universal adoption; implication is but another term for meaning and intention, apparent in the writing, on judicial inspection; "the evident consequence" (1 Bl. Com. 250); "or some necessary consequence resulting from the law" (2 Ves. sen. 351); or the words of an instrument; in the construction of which, the words, the subject, the context, the intention of the person using them, are all to be taken into view. 4 Wheat. 415; 6 Pet. 739, 741. Such is the sense in which the common expression is used in the books, "express words or necessary implication," such as arise on the words, taken in connection with other sources of construction; but not by conjecture, supposition or mere reasoning on the meaning or intention of the writing. All rules would be subverted, if mere extraneous matter should have the effect of interpreting a supreme law, differently from its obvious or necessarily to be implied sense (see 9 Wheat. 188, &c.), so apparent as to overrule the words used. 6 Ibid. 380. "Controversies between two or more states," "all contro

versies of a civil nature, where a state is a party ;" are broad comprehensive terms ; by no obvious meaning or necessary implication, excluding those which relate to the title, boundary, jurisdiction, or sovereignty of a state. 6 Wheat. 378.

The judiciary act makes certain exceptions, which apply only to cases of private persons, and cannot embrace a case of state against state ; established rules forbid the extension of the exception to such cases if they are of a civil nature. What then are "controversies of a civil nature," between state and state, or more than two states? We must presume that congress did not mean to exclude from our jurisdiction those controversies, the decision of which the states had confided to the judicial power, and are bound to give to the constitution and laws such a meaning as will make them harmonize, unless there is an apparent, or fairly to be implied, conflict between their respective provisions. In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted (12 Wheat. 354 ; 6 Ibid. 416 ; 4 Pet. 431–2), to ascertain the old law, the mischief and the remedy. It is a part
*724] of the public history of the United *States, of which we cannot be judicially ignorant, that at the adoption of constitution, there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies. New Hampshire and New York contended for the territory which is now Vermont, until the people of the latter assumed, by their own power, the position of a state, and settled the controversy, by taking to themselves the disputed territory as the rightful sovereign thereof. Massachusetts and Rhode Island are now before us. Connecticut claimed part of New York and Pennsylvania ; she submitted to the decree of the council of Trenton, acting pursuant to the authority of the confederation, which decided that Connecticut had not the jurisdiction ; but she claimed the right of soil till 1800. New Jersey had a controversy with New York, which was before this court in 1832 ; and one yet subsists between New Jersey and Delaware. Maryland and Virginia were contending about boundaries, in 1835, when a suit was pending in this court ; and the dispute is yet an open one. Virginia and North Carolina contended for boundary till 1802 ; and the remaining states, South Carolina and Georgia, settled their boundary in the April preceding the meeting of the general convention, which framed and proposed the constitution. 1 Laws U. S. 466. With the full knowledge that there were, at its adoption, not only existing controversies between two states singly, but between one state and two others, we find the words of the constitution applicable to this state of things, "controversies between two or more states." It is not known, that there were any such controversies then existing, other than those which relate to boundary ; and it would be a most forced construction, to hold that these were excluded from judicial cognisance, and that it was to be confined to controversies to arise prospectively on other subjects. This becomes the more apparent, when we consider the context, and those parts of the constitution which bear directly on the boundaries of states ; by which it is evident, that there remained no power in the contending states to settle a controverted boundary between themselves, as states competent to act by their

own authority on the subject-matter, or in any department of the government, if it was not in this.

By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into "any treaty, alliance or confederation;" no power under the *government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, in a prohibition against any state entering "into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay." By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole* v. *Fleeger*, 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries. 11 Pet. 209; s. p. 1 Ves. sen. 448–9; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims* v. *Irvine*, 3 Dall. 425–54; and in *Marlatt* v. *Silk*, 11 Pet. 2, 18; *Burton* v. *Williams*, 3 Wheat. 529–33, &c. [*725

In looking to the practical construction of this clause of the constitution, relating to agreements and compacts by the states, in submitting those which relate to boundaries to congress, for its consent, its giving its consent, and the action of this court upon them; it is most manifest, that by universal consent and action, the words "agreement" and "compact," are construed to include those which relate to boundary; yet that word boundary is not used. No one has ever imagined, that compacts of boundary were excluded, because not expressly named; on the contrary, they are held by the states, congress and this court, to be included by necessary implication; the evident consequence resulting from their known object, subject-matter, the context, and historical reference to the state of the times and country. No such exception has been thought of, as it would *render the clause a perfect nullity for all practical purposes; especially, the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts; not to prevent the states from settling their own boundaries, so far as merely affected their relations to each other; but to guard against the derangement of their federal relations with the other states of the Union, and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure. [*726

Every reason which has led to this construction, applies with equal

force to the clause granting to the judicial power jurisdiction over controversies between states, as to that clause which relates to compacts and agreements; we cannot make an exception of controversies relating to boundaries, without applying the same rule to compacts for settling them; nor refuse to include them within one general term, when they have uniformly been included in another. Controversies about boundary are more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements. If the constitution has given to no department the power to settle them, they must remain interminable; and as the large and powerful states can take possession, to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power; the possession of the large state must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it is known, that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.

There can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power; the former is limited, in express terms, to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter *can be exer- *727] cised only by this court, when a state is a party, the power is here, or it cannot exist. For these reasons, we cannot be persuaded, that it could have been intended to provide only for the settlement of boundaries, when states could agree; and to altogether withhold the power to decide controversies on which the states could not agree, and presented the most imperious call for speedy settlement.

There is another clause in the constitution which bears on this question. The judicial power extends to "controversies between citizens of different states;" "between citizens of the same state claiming lands under grants of different states." We cannot but know, judicially, that the latter classes of cases must necessarily arise on boundary; and that few, if any, ever arise from any other source. If there is a compact between the states, it settles the line of original right; it is the law of the case, binding on the states and its citizens, as fully as if it had never been contested; if there is no compact, then the controversy must be settled, by adjudging where the line of boundary ought to be, by the laws and rules appropriate to the case. 6 Wheat. 393; 2 Pet. 300. It is not recollected, that any such cases have ever arisen, "between citizens of the same state," as the judiciary acts have made no provision for this exercise of this undoubted constitutional jurisdiction; and it is not necessary for the decision of this cause, to inquire whether a law is necessary for this purpose. But for the other class of cases, "controversies between citizens of different states," the 11th section of the judiciary act makes provision; and the circuit courts, in their original, and this court, in

its appellate, jurisdiction, have decided on the boundaries of the states, under whom the parties respectively claim ; whether there has been a compact or not. The jurisdiction of the circuit court in such cases was distinctly and expressly asserted by this court as early as 1799, in *Fowler* v. *Miller*, 3 Dall. 411–12 ; s. p. 5 Pet. 290. In *Handly's Lessee* v. *Anthony*, the circuit court of Kentucky decided on the boundary between that state and Indiana, in an ejectment between these parties ; and their judgment was affirmed by this court. 5 Wheat. 375 ; 3 Ibid. 212–18 ; s. p. *Harcourt* v. *Gaillard*, 12 Ibid. 523. When the boundaries of states can be thus decided collaterally, in suits between individuals, we cannot, by any just rule of interpretation, declare that this court cannot adjudicate on the question of boundary, when it is presented directly in a controversy between two or more states, and is the only point in the cause.

*There is yet another source of reference, from which to ascertain the true construction of the constitution. By the ninth article [*728 of confederation adopted by the legislatures of the several states, it is provided, "that the United States in congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or which may hereafter arise between two or more states, concerning boundary, jurisdiction, or any other cause whatever." It directed the appointment of a tribunal, whose judgment should be final and conclusive. It also gave to congress power to appoint a judicial tribunal, to decide on a petition of either of the parties, claiming land under grants of two or more states, who had adjusted their boundaries, but had previously made the grants on which the controversy arose. One of the most crying evils of the confederation was, that it created no judicial power, without the action of congress ; and confined the power of that body to the appointment of courts for the trial of piracies and felonies committed on the high seas ; for determining finally on appeal, in all cases of captures ; and for the adjustment of the controversies before referred to. Yet, defective as was the confederation in other respects, there was full power to finally settle controverted boundaries in the two cases, by an appeal by a state, or petition of one of its citizens. This power was given, from the universal conviction of its necessity, in order to preserve harmony among the confederated states, even during the pressure of the revolution. If, in this state of things, it was deemed indispensable to create a special judicial power, for the sole and express purpose of finally settling all disputes concerning boundary, arise how they might ; when this power was plenary, its judgment conclusive on the right ; while the other powers delegated to congress were mere shadowy forms ; one conclusion at least is inevitable. That the constitution which emanated directly from the people, in conventions in the several states, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of confederation, adopted by the mere legislative power of the states, had given to a special tribunal appointed by congress, whose members were the mere creatures and representatives of state legislatures, appointed by them, without any action by the people of the state. This court exists by a direct grant from the people of their judicial power ; it is exercised by their authority, as their agent, selected by themselves, for the purposes specified ; the people of the states, as they *respectively became parties to the consti- [*729

tution, gave to the judicial power of the United States, jurisdiction over themselves, controversies between states, between citizens of the same or different states, claiming lands under their conflicting grants, within disputed territory. No fact was more prominent in our history, none could have been more strongly impressed on the members of the general and state conventions, than that contests for the vacant lands of the crown long threatened the dissolution of the confederation, which existed, practically and by common consent, from 1774 to 1781; when, after five years of discussion, it was ratified by the legislatures of all the states. This court has attested the fact. 6 Cranch 142; 5 Wheat. 376. Similar danger was imminent, from controversies about boundaries between the states, till provision was made for their decision, with a proviso, "that no state should be deprived of territory for the benefit of the United States." 1 Laws U. S. 17. These two provisions, taken in connection, put an end to any fears of convulsion, by the contests of states about boundary and jurisdiction, when any state could, by appeal, bring the powers of congress and a judicial tribunal into activity; and the United States could not take any vacant land within the boundary of a state. Hence resulted the principles laid down by this court in *Harcourt* v. *Gaillard*, 12 Wheat. 526, that the boundaries of the United States were the external boundaries of the several states; and that the United States did not acquire any territory by the treaty of peace, in 1783.

Yet, though this express provision was made to settle controverted boundaries by judicial power, congress had no supervision over compacts and agreements between states as to boundary, save on grants made before the compact; the states did, and could, so settle them, without the consent of congress, to whom, as no express power on or over the subject of such compacts was delegated, their dissent could not invalidate them. Such was the law of the confederacy, during a common war, when external danger could not suppress the danger of dissolution from internal dissensions; when owing to the imbecility of congress, the powers of the states being reserved for legislative and judicial purposes, and the utter want of power in the United States to act directly on the people of the states, on the rights of the states (except those in controversy between them) or the subject-matters on which they had delegated but mere shadowy jurisdiction, a radical change of government became necessary. The constitution, which superseded the articles of confederation, erected *a new government, *730] organized it into distinct departments, assigning to each its appropriate powers, and to congress the power to pass laws for carrying into execution the powers granted to each; so that the laws of the Union could be enforced, by its own authority, upon all persons and subject-matters, over which jurisdiction was granted to any department or officer of the government of the United States. It was to operate in a time of peace with foreign powers, when foreign pressure was not in itself some bond of union between the states, and danger from domestic sources might be imminent; to extend the legislative, executive and judicial power, alike over persons and states, on the enumerated subjects by their own grants. The states submitted to its exercise, waived their sovereignty, and agreed to come to this court to settle their controversies with each other, excepting none in terms. So they had agreed by the confederation; not only not excepting, but in express terms, including, all disputes and differences whatever.

In the front of the constitution is a declaration by the sovereign power from which it emanated, that it was ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity," &c. Whether it was best calculated to effect these objects, by making the judicial power utterly incompetent to exercise a jurisdiction expressly delegated to the old congress and its constituted court, over states and their boundaries, in the plenitude of absolute power, yet granted only by the legislative power of the several states; or whether the powers granted to this court by the people of all the states, ought, by mere construction and implication, to be held inefficient for the objects of its creation, and not capable of "establishing justice" between two or more states—are the direct questions before us for consideration.

Without going further into any general consideration on the subject, there is one which cannot be overlooked, and is imperious in its results. Under the confederation, the states were free to settle their controversies of any kind whatever, by compact or agreement; under the constitution, they can enter into none, without the consent of congress, in the exercise of its political power; thus making an amicable adjustment a political matter for the concurring determination of the states and congress, and its construction a matter of judicial cognisance by any court to which the appropriate resort may be had, by the judiciary act. This has uniformly been done in the courts of the states and *Union; no one has ever deemed such an exercise of power to be extra-judicial, or a case which called for it to be *coram non judice*. When, therefore, the court judicially inspects the articles of confederation, the preamble to the constitution, together with the surrender, by the states, of all power to settle their contested boundaries, with the express grant of original jurisdiction to this court; we feel not only authorized, but bound, to declare, that it is capable of applying its judicial power, to this extent at least: 1. To act as the tribunal substituted by the constitution in place of that which existed at the time of its adoption, on the same controversies, and to a like effect. 2. As the substitute of the contending states, by their own grant, made in their most sovereign capacity, conferring that pre-existing power, in relation to their own boundaries, which they had not surrendered to the legislative department; thus separating the exercise of political from judicial power, and defining each. [*731

There is but one power in this Union, paramount to that by which, in our opinion, this jurisdiction has been granted, and must be brought into action, if it can. That power has been exerted in the 11th amendment; but while it took from this court all jurisdiction, past, present and future (3 Dall. 382), of all controversies between states and individuals; it left its exercise over those between states as free as it had been before. This, too, with the full view of the decisions of this court, and the act of 1789, giving it exclusive jurisdiction of all controversies of a civil nature, where a state is a party; and there can be no subject on which the judicial power can act with a more direct and certain tendency, to effectuate the great objects of its institution, than the one before us. If we cannot "establish justice" between these litigant states, as the tribunal to which they have both submitted the adjudication of their respective controversies, it will be a source of deep regret to all who are desirous that each department of the government of the Union should have the capacity of acting within its appropriate

orbit, as the instrument appointed by the constitution, so to execute its agency as to make this bond of union between the states more perfect, and thereby enforce the domestic tranquillity of each and all.

Being thus fully convinced that we have an undoubted jurisdiction of this cause, so far as we have proceeded in examining whether, by a true and just construction of the constitution and laws, it is included or excluded, in the grant of judicial power, for any purpose; *we now proceed to
*732] inquire, how that jurisdiction shall be exerted; whether to retain or dismiss the complainant's bill. This depends on our jurisdiction over any of the matters on which the plaintiff asks our interposition. If there is any one subject on which we can act, the bill must be retained; so that the true inquiry is, not as to the extent, but the existence of any jurisdiction. 1 Ves. sen. 203, 205; 2 Ibid. 356.

The bill prays, 1. For the ascertaining and establishing the boundary line between the states, by the order of this court. 2. That the right of jurisdiction and sovereignty of the plaintiff to the disputed territory may be restored to her, and she be quieted in the enjoyment thereof, and her title thereto; and for further relief. If we can decree any relief specially called for, or any other relief, consistently with the specific prayer, we must proceed in the cause. 10 Pet. 228; 8 Ibid. 536.

The first prayer is, to ascertain and establish a boundary. Having expressed our opinion, that the subject of boundary is within our jurisdiction, we must exercise it to some extent, and on some matter connected with, or dependent upon it; and as the bill is on the equity side of the court, it must be done according to the principles and usages of a court of equity.

In the bill are set forth various charters from the crown, from 1621 to 1691, and sundry proceedings by the grantees and the crown, in relation thereto; also agreements between the parties, as colonies and states, for adjusting their boundaries, and the proceedings of their respective legislatures and commissioners, in relation thereto, from 1709 to 1818. The plaintiff relies on the charters of the two colonies, as the rule by which to settle the boundary; on the continued assertion of her rights, as well by the charter, as her previous purchase from the Indians; denying altogether the validity of the agreement and subsequent proceedings; averring that they were made under misrepresentation and mistake, as to material facts. On the other hand, the defendant pleads the agreements as a bar; that they are binding, and have been ratified by the plaintiff. So that the plaintiff rests his case on a question of original boundary, unaffected by any agreement; the defendant rests on the agreements, without regard to the original charter boundaries. One asking us to annul, the other to enforce the agreements; one averring continual claim, the other setting up the quiet, unmolested possession for more than a century, in strict conformity to, and by the line in the agreements. *Our first inquiry then must be, as to
*733] our power to settle the boundary; in other words, to decide what portion of the territory in dispute belongs to the one state or the other, according to the line which is their common boundary. There is not, in fact, nor by any law can be, any territory which does not belong to one or the other state; so that the only question is to which the territory belongs. This must depend on the right by which each state claims the territory in

question. Both claim under grants of contiguous territory, by the king, in whom was the absolute propriety and full dominion in and over it (9 Pet. 745–8; 8 Wheat. 595); the line drawn, or pointed out in his grant, is, therefore, that which is designated in the two charters as the common boundary of both. 5 Wheat. 375.

The locality of that line is matter of fact, and when ascertained, separates the territory of one from the other; for neither state can have any right beyond its territorial boundary. It follows, that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction and sovereignty are inseparable incidents, and remain so, till the state makes some cession. The plain language of this court in the *United States* v. *Bevans*, 3 Wheat. 386 *et seq.*, saves the necessity of any reasoning on this subject. The question is put by the court—"What, then, is the extent of jurisdiction which a state possesses?" "We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory—co-extensive with its legislative power. The place described is, unquestionably, within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to (by) the United States." Ibid. 387. "A cession of territory is essentially a cession of jurisdiction." Ibid. 388. "Still, the general jurisdiction over the place, subject to this grant of power (to the United States), adheres to the territory as a portion of sovereignty not yet given away." Ibid. 389. This principle is embodied in the sixteenth clause of the eighth section, first article, of the constitution, relative to this district; forts, arsenals, dock-yards, magazines; and uniformly applied to all acquisitions of territory by the United States, in virtue of cessions by particular states, or foreign nations. 5 Wheat. 324; Ibid. 375; 3 Ibid. 388–9; 2 Pet. 300, &c. Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when boundary is ascertained, which, being the line of territory, is the *line of power [*734
over it; so that great as questions of jurisdiction and sovereignty may be, they depend in this case on two simple facts. 1. Where is the southernmost point of Charles river? 2. Where is the point, three English miles in a south line, drawn from it? When these points are ascertained, which, by the terms, are those called for in both charters, then an east and west line from the second point, is necessarily the boundary between the two states, if the charters govern it.

If this court can, in a case of original jurisdiction, where both parties appear, and the plaintiff rests his case on these facts, proceed to ascertain them; there must be an end of this cause, when they are ascertained, if the issue between them is upon original right by the charter boundaries. We think, it does not require reason or precedent, to show that we may ascertain facts, with or without a jury, at our discretion, as the circuit courts, and all others do, in the ordinary course of equity; our power to examine the evidence in the cause, and thereby ascertain a fact, cannot depend on its effects, however important in their consequences. Whether the sovereignty of the United States, of a state, or the property of an individual, depends on the locality of a tree, a stone, or water-course; whether the right depends on a charter, treaty, cession, compact, or a common deed; the right is to territory, great or small in extent, and power over it, either of government or private property; the title of a state is sovereignty, full and absolute

dominion (2 Pet. 300–1); the title of an individual, such as the state makes it by its grant and law.

No court acts differently in deciding on boundary between states, than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied, without either, they decree what and where the boundary of a farm, a manor, province, or a state, is and shall be. When no other matter affects a boundary, a decree settles it as having been by original right, at the place decreed; in the same manner, as has been stated, where it is settled by treaty or compact; all dependent rights are settled, when boundary is. 1 Ves. sen. 448–50. If, heretofore, there was an issue in this case, on the locality of the point three
*735] miles south of the southernmost point of Charles river, we *should be competent to decide it; and decree where the boundary between the states was, in 1629 and 1663, at the dates of their respective charter.

On these principles, it becomes unnecessary to decide on the remaining prayers of the bill; if we grant the first, and settle boundary, the others follow; and if the plaintiff obtains relief as to that, he wants no other. The established forms of such decrees extend to everything in manner or way necessary to the final establishment of the boundary, as the true line of right and power between the parties.

This, however, is not a case where there is an issue on original boundary; the defendant does not rest on that fact, but puts in a plea, setting up an agreement or compact of boundary between the parties, while colonies, and the actual establishment of a line agreed on, run, marked and ratified by both colonies, long possession, and a right by prescription to all the territory north of such line. This presents a case, on an agreement on one side, alleged to be conclusive upon every matter complained of in the bill; on the other, to be invalid for the reasons alleged. If this matter of the plea is sufficient in law, and true in fact, it ends the cause; if not so in both respects, then the parties are thrown back on their original rights, according to their respective claims to the territory in question; by charters, or purchase from the Indians. If, then, we can act at all on the case, we must, on this state of the pleadings, decide on the legal sufficiency of the plea, if true, as on a demurrer to it; next, on the truth of its averments; and then decide whether it bars the complaint of the plaintiff, and all relief; if it does not, then we must ascertain the fact on which the whole controversy turns. In the first aspect of the case, it presents a question of the most common and undoubted jurisdiction of a court of equity; an agreement which the defendant sets up as conclusive to bar all relief, and the plaintiff asks to be declared void, on grounds of the most clear and appropriate cognisance in equity, and not cognisable in a court of law. A false representation made by one party, confided in by the other, as to a fact on which the whole cause depends; the execution of the agreement, and all proceedings under it, founded on a mistaken belief of the truth of the fact represented. We must, therefore, do something in the cause; unless the defendants have, in their objections,

made out this to be an exception to the usual course of equity, in its action on questions of boundary.

*It is said, that this is a political, not civil, controversy between the parties; and so not within the constitution, or 13th section of the judiciary act. As it is viewed by the court, it is on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles river; which is the only question which can arise under the charter. Taking the case on the bill and plea, the question is, whether the stake set up on Wrentham Plains, by Woodword and Saffrey, in 1642, is the true point from which to run an east and west line, as the compact boundary between the states. In the first aspect of the case, it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature, of frequent occurence in suits between individuals. This controversy, then, cannot be a political one, unless it becomes so by the effect of the settlement of the boundary; by a decree on the fact, or the agreement; or because the contest is between states as to political rights and power, unconnected with the original or compact boundary. [*736

We will not impute to the men who conducted the colonies at home, and in congress, in the three declarations of their rights, previous to the consummation of the revolution, from 1774 to 1776, and its final act, by a declaration of the rights of the states, then announced to the world, an ignorance of the effects of territorial boundary between them, in both capacities. Every declaration of the old congress would be falsified, if the line of territory is held not to have been, from the first, the line of property and power. The congress which, in 1777, framed and recommended the articles of confederation for adoption, by the legislative power of the several states, were acting in a spirit of fatuity, if they thought that a final and conclusive judgment on state boundaries, was not equally decisive as to the exercise of political power by a state; making it rightful within, but void beyond, the adjudged line. The members of the general and state conventions, were alike fatuitous, if they did not comprehend, and know, the effect of the states submitting controversies between themselves, to judicial powers; so were the members of the first congress of the constitution, if they could see and not know, read and not understand, its plain provisions, when many of them assisted in its frame.

The founders of our government could not but know, what has *ever been, and is, familiar to every statesman and jurist, that all controversies between nations, are, in this sense, political and not judicial, as none but the sovereign can settle them. In the declaration of independence, the states assumed their equal station among the powers of the earth, and asserted, that they could of right do, what other independent states could do; "declare war, make peace, contract alliances;" of consequence, to settle their controversies with a foreign power, or among themselves, which no state, and no power, could do for them. They did contract an alliance with France, in 1778; and with each other, in 1781: the object of both was to defend and secure their asserted rights as states; but they surrendered to congress, and its appointed court, the right and power of settling their mutual controversies; thus making them judicial questions, [*737

whether they arose on "boundary, jurisdiction or any other cause whatever." There is neither the authority of law or reason for the position, that boundary between nations or states, is, in its nature, any more a political question, than any other subject on which they may contend. None can be settled without war or treaty, which is by political power; but under the old and new confederacy, they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before. We are thus pointed to the true boundary line between political and judicial power and questions. A sovereign decides by his own will, which is the supreme law within his own boundary (6 Pet. 714; 9 Ibid. 748); a court or judge decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.

It has never been contended, that prize courts of admiralty jurisdiction, *738] *or questions before them, are not strictly judicial; they decide on questions of war and peace, the law of nations, treaties, and the municipal laws of the capturing nation, by which alone they are constituted; *à fortiori*, if such courts were constituted by a solemn treaty between the state under whose authority the capture was made, and the state whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their subjects, and hold their final decrees conclusive on rights of property. 6 Cranch 284–5.

These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation (3 Ves. 429); the latter is that which is granted to a court or judicial tribunal. So, of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding of it; makes it the "subject of a treaty, to be settled as between states independent," or "the foundation of representations from state to state." This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the *equum et bonum* of the case, let who or what be the parties before them. These are the definitions of law as made in the great Maryland case of *Barclay* v. *Russell*, 3 Ves. 435, as they have long been settled and established. Their correctness will be tested by a reference to the question of original boundary, as it ever has been, and yet is, by the constitution of England; which was ours before the revolution, while colonies (8 Wheat. 588); as it was here from 1771 to

"It is a case of mutual treaty between persons acting, in that instance, as states independent of each other; and the circumstance that the East India Company are mere subjects with relation to this country, has nothing to do with that. That treaty was entered into with them, as a neighboring independent state, and is the same as if it was a treaty between two sovereigns: and consequently, is not a subject of municipal private jurisdiction." It thus is manifest, that if the answer had been to the merits, there must have been a decree; the dismissal resulted from the new matter added, as is evident from the opinion of the chancellor on the plea; and of Lord Commissioner EYRE, on the answer, and his closing remarks, in which he declares, "That the case was considered wholly independent of the judgment on the plea, and was decided on the answer, which introduced matters showing that it was not mercantile in its nature, but political; and therefore, the decision stood wholly clear of the judgment on the plea." 2 Ves. jr. 56, 60.

That a foreign sovereign may sue in an English court of law or equity, was settled in cases brought by the king of Spain. Hob. 113. That a foreign government may sue in chancery, by such agents as it authorizes to represent them, on whom a cross-bill can be served, with such process as will compel them to do justice to the defendant, was decided in the *Columbian Government* v. *Rothschild*, 1 Sim. 104. These cases were recognised in the *King of Spain* v. *Machado*, by the house of lords; who held that a king had the same right to *sue as any other person, but that when [*742
he did sue in chancery, it was as any other suitor, who sought or submitted to its jurisdiction; that it could decide on the construction and validity of the treaties between France and the allied sovereigns of Europe in 1814; and on the validity of a private and separate treaty between France and Spain. The case involved both questions; both were fully considered by the lords, in affirming the decree of the chancellor, overruling the demurrer (4 Russ. 560); which assigned for cause, that the plaintiff had not made out a case for any relief in a court of equity, for the reasons assigned in the argument—that a foreign sovereign could not sue in virtue of his prerogative rights; that an English court would not enforce these rights, accruing out of a treaty with France, which was inconsistent with the existing relations between each of those countries (France and Spain) and the king of England. 2 Bligh P. C. (N. S.) 31, 44, 46, 50, 60. The court of king's bench also will consider the effect of the declaration of independence and treaty of peace, in an action on a bond. *Ogden* v. *Folliott*, 3 T. R. 730.

From this view of the law of England, the results are clear, that the settlement of boundaries by the king in council, is by his prerogative; which is political power acting on a political question between dependent corporations or proprietaries, in his dominions, without the realm. When it is done in chancery, it is by its judicial power, in "judicature according to the law," and necessarily a judicial question, whether it relates to the boundary of provinces, according to an agreement between the owners, as *Penn* v. *Baltimore*; the title to a feudal kingdom, in a suit appropriate to equity, where the feudal king appears and pleads, as in the case of the Isle of Man; or on an agreement between a foreign sovereign and the East India Company, in their mere corporate capacity. But when the company assume the character of a sovereign, assert the agreement to be a "federal treaty,"

also in virtue of the royal prerogative, by which the charter was made. But chancery could not act on boundaries in the royal or chartered colonies; it could act on lords proprietors of provinces, when they were in the realm, where they were subjects; though in their provinces they were sovereign, dependent only on the crown and the general supremacy of parliament. Acts of parliament did not bind them, unless extended to them expressly, or by necessary consequence. 2 Ves. sen. 351. They had all the powers of counts palatine, the absolute propriety of soil, and the powers of legislation; the only restraint upon them was by the powers reserved to the king by his letters-patent, and allegiance to the crown in matters of prerogative not granted. The power of parliament was, on the American principle of the revolution, confined to the regulation of external commerce;" though, by the English principle, it extended to all cases whatever. Yet, sovereign as they were as to all things, except those relating to the powers of the king and parliament, chancery could and did act on agreements between them as to their boundaries, in the case of *Penn* v. *Baltimore;* though it could not have done so, had they stood at arm's length; in which case, the king in counsel could alone have decided the original boundary on an appeal. 1 Ves. sen. 446. Chancery also could and did decide on the title to the Isle of Man, which was a feudal kingdom; on a bill for discovery of title, relief as to rectories and tithes, which was a mere franchise, a plea to the jurisdiction was overruled. *Derby* v. *Athol*, 1 Ves. sen. 202; s. p. *Bishop of Sodor & Man* v. *E. Derby*, 2 Ibid. 337, 356.

In each of these cases, objections to the jurisdiction were made, similar to those made in this, but were overruled; and neither the authority nor principles of either have been questioned; on the contrary, they have been recognised and adopted by all courts which follow the course of the law of England; yet each involve the same question as the present. In the first, the decree as to boundary settled, by consequence, the collateral and dependent questions of title, jurisdiction and sovereignty, of and over the disputed territory; in the last two, on a suit for rectories and tithes, the title to a feudal kingdom was but a dependent matter, and was settled, by deciding that the bishop had a right to the tithes he claimed.

The same principle was settled in the case of the *Nabob of the Carnatic* v. *East India Company*, though it is commonly referred to in favor of a contrary position. *On the original proceedings, the case was on a bill for an account, founded on two agreements between the parties, in 1785 and 1787. The defendants pleaded their rights and privileges under their charter, with power to make peace and war within its limits; that the plaintiff was a sovereign prince; that the agreements stated in the bill were made with him, in their respective capacities, one as an absolute, the other as a qualified sovereign; and that the matters therein contained related to peace and war, and the security and defence of their respective territorial possessions. The plea was considered and overruled by the chancellor; thus exercising jurisdiction to that extent. 1 Ves. jr. 371, 387. An answer was then put in, containing the same matter as the plea; adding that the agreements between the parties were treaties of a federal character, both being sovereigns; and that the agreement of 1787 was a final treaty; and therefore, the subject-matters thereof were cognisable by the law of nations, not by a municipal court. The bill was dismissed on this ground:

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between them and the plaintiff, as neighboring sovereigns, each independent, and the subject-matter to be peace and war, political in its nature, on which no municipal court can act by the law of nations, chancery has no jurisdiction but to dismiss the bill. Not because it is founded on a treaty, but because the defendant refused to submit it to judicial power; for, had the company not made the objection, by their answer, the court must have proceeded as in the *King of Spain* v. *Machado*, and decreed on *the
*743] validity, as well as the construction of the treaties. The court, in one case, could not force a sovereign defendant to submit the merits of the case to their cognisance; but in the other, when he was plaintiff, and a subject was a defendant, who appeared and pleaded, the whole subject-matter of the pleadings was decided by judicial power, as a judicial question; and such has been, and is the settled course of equity in England.

In the colonies, there was no judicial tribunal which could settle boundaries between them; for the court of one could not adjudicate on the rights of another, unless as a plaintiff. The only power to do it remained in the king, where there was no agreement; and in chancery, where there was one, and the parties appeared: so that the question was partly political and partly judicial, and so remained till the declaration of independence. Then, the states, being independent, reserved to themselves the power of settling their own boundaries, which was necessarily a purely political matter, and so continued till 1781. Then, the states delegated the whole power over controverted boundaries to congress, to appoint and its court to decide, as judges, and give a final sentence and judgment upon it, as a judicial question, settled by a specially-appointed judicial power, as the substitute of the king in council, and the court of chancery, in a proper case; before the one as a political, and the other, as a judicial question. Then came the constitution, which divided the power between the political and judicial departments, after incapacitating the states from settling their controversies upon any subject, by treaty, compact or agreement; and completely reversed the long-established course of the laws of England. Compacts and agreements were referred to the political, controversies to the judicial power. This presents this part of the case in a very simple and plain aspect. All the states have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the confederation of 1781 and 1788; that we should do that which neither states or congress could do—settle the controversies between them. We should forget our high duty, to declare to litigant states that we had jurisdiction over judicial, but not the power to hear and determine political controversies; that boundary was of a political nature, and not a civil one; and dismiss the plaintiff's bill from our records, without even giving it judicial consideration. We should equally forget the dictates
*744] *of reason; the known rule drawn by fact and law, that from the nature of a controversy between kings or states, it cannot be judicial; that where they reserve to themselves the final decision, it is of necessity by their inherent political power; not that which has been delegated to the judges, as matters of judicature, according to the law.

These rules and principles have been adopted by this court from a very early period. In 1799, it was laid down, that though a state could not sue at law, for an incorporeal right, as that of sovereignty and jurisdiction;

there was no reason why a remedy could not be had in equity. That one state may file a bill against another, to be quieted as to the boundaries of disputed territory, and this court might appoint commissioners to ascertain and report them; since it is monstrous to talk of existing rights, without correspondent remedies. 3 Dall. 413. In *New Jersey* v. *Wilson*, the only question in the case was, whether Wilson held certain lands exempt from taxation. 7 Cranch 164. In *Cohens* v. *Virginia*, the court held, that the judicial power of the United States must be capable of deciding any judicial question growing out of the constitution and laws. That in one class of cases, "the character of the parties is everything, the nature of the case nothing;" in the other, "the nature of the case is everything, the character of the parties nothing." That the clause relating to cases in law or equity, arising under the constitution, laws and treaties, makes no exception in terms, nor regards "the condition of the party." If there be any exception, it is to be implied against the express words of the article. In the second class, "the jurisdiction depends entirely on the character of the parties," comprehending "controversies between two or more states." "If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union." 6 Wheat. 378, 384, 392–3.

In the following cases, it will appear, that the course of the court on the subject of boundary, has been in accordance with all the foregoing rules; let the question arise as it may, in a case in equity, or a case in law, of a civil or criminal nature; and whether it affects the rights of individuals, of states, or the United States, and depends on charters, laws, treaties, compacts or cessions which relate to boundary. In *Robinson* v. *Campbell*, the suit involved the construction of the compact of boundary between Virginia and North Carolina, made in 1802; and turned on the question, whether the land in controversy *was always within the original limits of Tennessee, which the court decided. 3 Wheat. 213, 218, 224. [*745

United States v. *Bevan* was an indictment for murder; the questions certified for the opinion of this court were: 1st, whether the place at which the offence was committed, was within the jurisdiction of Massachusetts; and 2d, whether it was committed within the jurisdiction of the circuit court of that district. It was considered and decided, as a question of boundary (3 Wheat. 339, 386), as before stated. In *Burton* v. *Williams*, the case involved a collision of interest between North Carolina, Tennessee and the United States, under the cessions by the former to the two latter, in which this court reviewed all the acts of congress and of the two states on the subject, and the motives of the parties, to ascertain whether the *casus fœderis* had ever arisen. The case also involved the construction of the compact between Tennessee and the United States, made in 1806. The court use this language in relation to it: "The members of the American family possess ample means of defence, under the constitution, which we hope ages to come will verify. But happily for our domestic harmony, the power of aggressive operation against each other is taken away." It is difficult to imagine, what other means of defence existed in such a case, unless those which the court adopted, by construing the acts recited, as the contracts of independent states, by those rules which regulate contracts relating to territory and boundary. 3 Wheat. 529, 533, 538. In *De la Croix* v. *Chamberlain*,

it was held, that "a question of disputed boundary between two sovereign, independent nations, is indeed more properly a subject for diplomatic discussion and of treaty, than of judicial investigation. If the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties." 12 Wheat. 600. Accordingly, in *Harcourt* v. *Gailliard*, which arose on a British grant, made in 1777, the court decided the case by reference to the treaty of 1763, the acts of the king before the revolution, the effect of the declaration of independence and treaty of peace in 1783, in order to ascertain the original boundary between Florida and Georgia; on which the whole case turned. 12 Wheat. 524. In *Henderson* v. *Poindexter*, the same point arose, and the same course was taken; the treaty of boundary with Spain in 1795, was also considered by the court, as well as the cession by Georgia to the United States in 1802, *746] and the various acts of congress on the *subject. 12 Wheat. 530, 534, &c. In *Patterson* v. *Jenks*, the title depended on the boundary between Georgia and the Cherokees; and the only question was, as to the territorial limits of the state, according to the treatries with them and that state, which the court defined, and decided accordingly. 2 Pet. 225–7, &c. So, they had previously done in various cases, arising on the boundary between North Carolina and the Cherokees. 1 Wheat. 155; 2 Ibid. 25; 9 Ibid. 673; 11 Ibid. 380.

In *Foster* v. *Neilson*, two questions arose: 1. On the boundary of the treaty of 1803, ceding Louisiana to the United States, as it was before the cession of the Floridas by Spain, by the treaty of 1819: 2d. The construction of the eighth article of that treaty. Both claimed the territory lying north of a line drawn east from the Iberville, and extending from the Mississippi to the Perdido. The title to the land claimed by the parties depended on the right of Spain to grant lands within the disputed territory, at the date of the Spanish grant to the plaintiff, in 1804. He claimed under it, as being then within the territory of Spain; and confirmed absolutely by the treaty of cession: the defendant rested on his possession. On the first question, the court held, that so long as the United States contested the boundary, it was to be settled by the two governments, and not by the court; but if the boundary had been settled between France, while she held Louisiana, and Spain, while she held Florida, or the United States and Spain had agreed on the boundary, after 1803; then the court could decide it as a matter bearing directly on the title of the plaintiff. On the second question, they held that as the government had, up to that time, construed the eighth article of the treaty of 1819, to be a mere stipulation for the future confirmation of previous grants by Spain, to be made by some legislative act, and not a present confirmation, absolute and final by the mere force of the treaty itself, as a supreme law of the land, the court was bound not to give a different construction. On that construction, the question was, by whom the confirmation should be made; the court held the words of the treaty to be the language of contract, to be executed by an act of the legislature, of course, by political power, to be exercised by the congress at its discretion; on which the court could not act. But the court distinctly recognised the distinction between an executory treaty, as a mere contract between nations, to be carried into execution by the sovereign power of the respective parties,

and an executed treaty, effecting of itself the object to be accomplished, and defined the line *between them thus: "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded [*747 in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract; when either of the parties stipulate to perform a particular act; the treaty addresses itself to the political, not to the judicial, department; and the legislature must execute the contract, before it can become a rule for the court." Adopting the construction given by congress, and the boundary being disputed in 1804, when the grant was made, the court considered both to be political questions; and held them not to be cognisable by judicial power. 2 Pet. 253, 299, 306, 309, 314–15. All the principles laid down in this case, were fully considered and affirmed in the *United States* v. *Arredondo;* which arose under an act of congress, submitting to this court the final decision of controversies between the United States and all persons claiming lands in Florida, under grants, &c., by Spain, and prescribing the rules for its decision, among which was the "stipulations of any treaty," &c. Thus acting under the authority delegated by congress; the court held, that the construction of the eighth article of the treaty of 1819, by its submission to judicial power, became a judicial question; and on the fullest consideration, held, that it operated as a perfect, present and absolute confirmation of all the grants which come within its provision. That no act of the political department remained to be done; that it was an executed treaty, the law of the land, and a rule for the court. 6 Pet. 710, 735, 741–3. In the *United States* v. *Percheman*, the court, on considering the necessary effect of this construction, repudiated that which had been given in *Foster* v. *Neilson*. 7 Pet. 89. In the numerous cases which have arisen since, the treaty has been taken to be an executed one, a rule of title and property, and all questions arising under it to be judicial; and congress has confirmed the action of the court, whenever necessary. In *New Jersey* v. *New York*, the court were unanimous in considering the disputed boundary between these states, to be within their original jurisdiction, and re-affirming the jurisdiction of the circuit courts, in cases between parties claiming lands under grants from different states; the only difference of opinion was on one point, suggested by one of the judges, whether, as New York had not appeared, the court would award compulsory process, or proceed *ex parte;* a point which does not arise in this cause, and need *not to be considered in its present [*748 stage; as Massachusetts has appeared and plead to the merits of the bill.

If judicial authority is competent to settle what is the line between judicial and political power and questions, it appears from this view of the law, as administered in England and the courts of the United States, to have been done without any one decision to the contrary, from the time of Edward III. The statute referred to, operated, like our constitution, to make all questions judicial, which were submitted to judicial power, by the parliament of England, the people or legislature of these states, or congress, and when this has been done by the constitution, in reference to disputed boundaries, it will be a dead letter, if we did not exercise it now, as this court has done in the cases referred to.

The course of the argument made it necessary for the court to pursue that which has been taken. Having disposed of the leading objection to jurisdiction, we will examine the others.

It has been argued by the defendant's counsel, that by the declaration of independence, Massachusetts became a sovereign state over all the territory in her possession, which she claimed by charter or agreement; in the enjoyment of which she cannot be disturbed. To this objection, there are two obvious answers: 1st. By the third article of confederation, the states entered into a mutual league for the defence of their sovereignty, their mutual and general welfare; being thus allies in the war of the revolution, a settled principle of the law of nations, as laid down by this court, prevented one from making any acquisition at the expense of the other. 12 Wheat. 525–6. This alliance continued, in war and peace, till 1788; when, 2d. Massachusetts surrendered the right to judge of her own boundary, and submitted the power of deciding a controversy concerning it to this court. 6 Wheat. 378, 380, 393.

It is said, that the people inhabiting the disputed territory, ought to be made parties, as their rights are affected. It might with the same reason be objected, that a treaty or compact settling boundary, required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void; as the authority to make it was derived from the legislative power only. The same objection was overruled in *Penn* v. *Baltimore*; and in *Poole* v. *Fleeger*, this court declared, that an agreement between states, consented to by congress, bound the citizens of each state. There are two principles of the law of nations, which would protect them in
*749] *their property: 1st. That grants by a government *de facto*, of parts of a disputed territory in its possession, are valid against the state which had the right. 12 Wheat. 600–1. 2d. That when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred. 8 Wheat. 589; 12 Ibid. 535; 6 Pet. 712; 7 Ibid. 857; 8 Ibid. 445; 9 Ibid. 133; 10 Ibid. 330, 718, &c.

It has been contended, that this court cannot proceed in this cause, without some process and rule of decision prescribed, appropriate to the case; but no question on process can arise on these pleadings; none is now necessary, as the defendant has appeared and pleaded, which plea in itself makes the first point in the cause, without any additional proceeding; that is, whether the plea shall be allowed, if sufficient in law to bar the complaint, or be overruled, as not being a bar in law, though true in fact. In this state of the case, it is that of the *Nabob* v. *East India Company*, where the plea was overruled, on that ground, whereby the defendant was put to an answer, assigning additional grounds, to sustain a motion to dismiss; or if the plea is allowed, the defendant must next prove the truth of the matters set up. When that is done, the court must decide according to the law of equity (1 Ves. sen. 446, 203), whether the agreement pleaded shall settle, or leave the boundary open to a settlement by our judgment, according to the law of nations, the charters from the crown under which both parties claim (as in 5 Wheat. 375); by the law of prescription, as claimed by the defendant, on the same principles which have been rules for the action of this court in the case. 1 Ves. sen. 453; 9 Pet. 760.

It is further objected, that though the court may render, they cannot

execute a decreee, without an act of congress in aid. In testing this objection by the common law, there can be difficulty in decreeing, as in *Penn* v. *Baltimore*, *mutatis mutandis*, that the agreement is valid and binding between the parties; appointing commissioners to ascertain and mark the line therein designated; order their proceedings to be returned to the court (3 Dall. 412, note); decree that the parties should quietly hold according to the articles; that the citizens on each side of the line should be bound thereby, so far and no farther, than the states could bind then by a compact, with the assent of congress (11 Pet. 209). 1 Ves. sen. 455; Belt's Supplement 195, 197. Or, if any difficulty should occur, do as declared in 1 Ves. sen.; if the parties want *anything more to be done, they must resort to another jurisdiction, which is appropriate to the cause [*750 of complaint, as the king's bench, or the king in council (see *United States* v. *Peters*, 5 Cranch 115, 135, case of Olmstead); make the decree without prejudice to the United States, or any persons whom the parties could not bind; and in case any person should obstruct the execution of the agreement, the party to be at liberty, from time to time, to apply to the court. 1 Ves. jr. 454; Belt 195–6. Or, as the only question is one of jurisdiction, which the court will not decide, they will retain the bill, and direct the parties to a *forum* proper to decide collateral questions. 1 Ves. sen. 204–5; 2 Ibid. 356–7; 1 Ibid. 454; 5 Cranch 115, 136. On the other hand, should the agreement not be held binding, the court will decree the boundary to be ascertained agreeable to the charters, according to the altered circumstances of the case; by which the boundary being established, the rights of the parties will be adjudicated, and the party in whom it is adjudged may enforce it by the process appropriate to the case, civilly and criminally, according to the laws of the state in which the act which violates the right is committed. In ordinary cases of boundary, the functions of a court of equity consists in settling it by a final decree, defining and confirming it when run; exceptions, as they arise, must be acted on according to the circumstances.

In England, right will be administered to a subject against the king, as a matter of grace; but not upon compulsion—not by writ, but petition to the chancellor (1 Bl. Com. 243); for no writ or process can issue against the king, for the plain reason given in 4 Co. 55 *a* (7 Day's Com. Dig. 83, Prerog. D. 78; 3 Bl. Com. 255): "that the king cannot command himself." No execution goes out on a judgment or decree against him, on a *monstrans de droit* or petition of right, or traverse of an inquisition which had been taken in his favor; for this reason, that as the law gives him a prerogative for the benefit of his subjects (1 Bl. Com. 255), he is presumed never to do a wrong, or refuse a right to a subject; he is presumed to have done the thing by decreeing in his courts that it shall be done; such decree is executed by the law, as soon as it is rendered; and though process is made out to make the record complete, it is never taken from the office. Co. Ent. 196; 9 Co. 98 *a*; 7 Day's Com. Dig. 83. The party in whose favor a decree is made, for removing the lands of the king from the possession of a subject, or declaring a seizure unlawful, and awarding a writ *de libertate*, is, *eo instanti*, deemed to be in actual *possession thereof; so that a [*751 feoffment with livery of seisin, made before it is actually taken, is as valid as if made afterwards. Cro. Eliz. 523; S. P. 463.

The same principle was adopted by the eminent jurists of the revolution, in the ninth article of the confederation, declaring that the sentence of the court, in the cases provided for, should be final and conclusive, and with the other proceedings in the case, be transmitted to congress, and lodged among their acts, for the security of the parties concerned, nothing further being deemed necessary. The adoption of this principle was indeed a necessary effect of the revolution, which devolved on each state the prerogative of the king as he had held it in the colonies (4 Wheat. 651 ; 8 Ibid. 584, 588) ; and now holds it within the realm of England ; subject to the presumptions attached to it by the common law, which gave, and by which it must be exercised. This court cannot presume, that any state which holds prerogative rights for the good of its citizens, and by the constitution has agreed that those of any other state shall enjoy rights, privileges and immunities in each, as its own do, would either do wrong, or deny right to a sister state or its citizens, or refuse to submit to those decrees of this court, rendered pursuant to its own delegated authority ; when, in a monarchy, its fundamental law declares that such decree executes itself. When, too, the highest courts of a kingdom have most solemnly declared, that when the king is a trustee, a court of chancery will enforce the execution of a trust by a royal trustee (1 Ves. sen. 453) ; and that when a foreign king is a plaintiff in a court of equity, it can do complete justice ; impose any terms it thinks proper ; has him in his power, and completely under its control and jurisdiction (2 Bligh P. C. 57) ; we ought not to doubt as to the course of a state of this Union ; as a contrary one would endanger its peace, if not its existence. In the case of *Olmstead*, this court expressed its opinion, that if state legislatures may annul the judgments of the courts of the United States, and the rights thereby acquired, the constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws, by its own tribunal. So fatal a result must be deprecated by all ; and the people of every state must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves. 5 Pet. 115, 135.

The motion of the defendant is, therefore, overruled.

*752] *Taney, Ch. J. (*Dissenting.*)—I dissent from the opinion of the court, upon the motion to dismiss the bill. It has, I find, been the uniform practice in this court, for the justices who differed from the court on constitutional questions, to express their dissent. In conformity to this usage, I proceed to state briefly the principle on which I differ, but do not, in this state of the proceedings, think it necessary to enter fully into the reasoning upon which my opinion is founded. The final hearing of the case, when all the facts are before the court, would be a more fit occasion for examining various points stated in the opinion of the court, in which I do not concur.

I do not doubt the power of this court to hear and determine a controversy between states, or between individuals, in relation to the boundaries of the states, where the suit is brought to try a right of property in the soil, or any other right which is properly the subject of judicial cognisance and decision, and which depends upon the true boundary line. But the powers given to the courts of the United States by the constitution are judi-

cial powers; and extend to those subjects only which are judicial in their character; and not to those which are political. And whether the suit is between states or between individuals, the matter sued for must be one which is properly the subject of judicial cognisance and control, in order to give jurisdiction to the court to try and decide the rights of the parties to the suit.

The object of the bill filed by Rhode Island, as stated in the prayer, is as follows: That the northern boundary line between your complainants and the state of Massachusetts may, by the order and decree of this honorable court, be ascertained and established, and that the rights of jurisdiction and sovereignty of your complainants to the whole tract of land, with the appurtenances mentioned, described and granted, in and by the said charter or letters-patent to the said colony of Rhode Island and Providence Plantations, hereinbefore set forth, and running on the north, an east and west line, drawn three miles south of the waters of said Charles river, or of any or every part thereof, may be restored and confirmed to your complainants, and your complainants may be quieted in the full and free enjoyment of her jurisdiction and sovereignty over the same; and the title, jurisdiction and sovereignty of the said state of Rhode Island and Providence Plantations over the same, be confirmed and established by the decree of this honorable court; and that your complainants *may have such other and further relief in the premises as to this honorable court shall seem meet, and [*753 consistent with equity and good conscience.

It appears from this statement of the object of the bill, that Rhode Island claims no right of property in the soil of the territory in controversy. The title to the land is not in dispute between her and Massachusetts. The subject-matter which Rhode Island seeks to recover from Massachusetts, in this suit, is "sovereignty and jurisdiction," up to the boundary line described in her bill. And she desires to establish this line as the true boundary between the states, for the purpose of showing that she is entitled to recover from Massachusetts the sovereignty and jurisdiction which Massachusetts now holds over the territory in question. Sovereignty and jurisdiction are not matters of property; for the allegiance in the disputed territory cannot be a matter of property. Rhode Island, therefore, sues for political rights. They are the only matters in controversy, and the only things to be recovered; and if she succeeds in this suit, she will recover political rights over the territory in question, which are now withheld from her by Massachusetts. Contests for rights of sovereignty and jurisdiction between states over any particular territory, are not, in my judgment, the subjects of judicial cognisance and control, to be recovered and enforced in an ordinary suit; and are, therefore, not within the grant of judicial power contained in the constitution.[1]

In the case of *New York* v. *Connecticut*, 4 Dall. 4, in the note, Chief Justice Ellsworth says, "To have the benefit of the agreement between the states, the defendants below, who are the settlers of New York, must apply to a court of equity, as well as the state herself; but in no case can a specific performance be decreed, unless there is a substantial right of soil, not a mere right of political jurisdiction, to be protected and enforced." In

[1] See Georgia *v.* Stanton, 6 Wall. 50.

the case of the *Cherokee Nation* v. *State of Georgia*, 5 Pet. 20, Chief Justice MARSHALL, in delivering the opinion of the court, said: "That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislation of Georgia, and to restrain the exertion of its physical force. The propriety of such an
*754] *interposition by the court may be well questioned. It savors too much of the exercise of political power, to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question."

In the case before the court, we are called on to protect and enforce the "mere political jurisdiction" of Rhode Island; and the bill of the complainant, in effect, asks us to "control the legislature of Massachusetts, and to restrain the exercise of its physical force," within the disputed territorry. According to the opinions above referred to, these questions do not belong to the judicial department. This construction of the constitution is, in my judgment, the true one; and I, therefore, think the proceedings in this case ought to be dismissed for want of jurisdiction.

BARBOUR, Justice, said, that he concurred in the result of the opinion in this case. That this court had jurisdiction to settle the disputed boundary between the two states litigant before it. But he wished to be understood, as not adopting all the reasoning by which the court had arrived at its conclusion.

STORY, Justice, did not sit in this case.

ON consideration of the motion made by Mr. Webster on a prior day of the present term of this court, to wit, on Monday the 15th day of January, A. D. 1838, to dismiss the complainant's bill filed in this case, for want of jurisdiction, and of the arguments of counsel thereupon had, as well in support of, as against the said motion: It is now here ordered and adjudged by this court, that the said motion be and the same is hereby overruled.[1]

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[1] For the further proceedings in this cause see *post*, p. 755; 13 Pet. 23; 14 Id. 210; and 4 How. 591. In the latter case, which was a decision on the merits, Massachusetts succeeded in establishing her claim to the disputed territory.

*The State of Massachusetts *ads.* The State of Rhode Island.

Suits between states.

The state of Massachusetts, after having appeared to process issued against her, at the suit of the state of Rhode Island, on a bill filed for the settlement of boundary, and after having filed an answer and plea to the bill, and having failed in a motion to dismiss the bill for want of jurisdiction, was, on motion of her counsel, allowed to withdraw her appearance. New York *v.* New Jersey, 5 Pet. 287; Grayson *v.* Virginia, 3 Dall. 320; Chisholm's Executors *v.* Georgia, 2 Dall. 419; cited.

In the case of Rhode Island *v.* Massachusetts, *ante*, p. 657, the court did not mean to put the jurisdiction of the supreme court on the ground that jurisdiction was assumed in consequence of the state of Massachusetts having appeared in that cause. It was only intended to say, that the appearance of the state superseded the necessity of considering the question, whether any and what course would have been adopted by the court, if the state had not appeared; the court did not mean to be understood, that the state had concluded herself, on the ground that she had voluntarily appeared; or, that if she had not appeared, the court would not have assumed jurisdiction of the case. Being satisfied the court had jurisdiction of the subject-matter of the bill, so far at least as respected the question of boudnary, all inquiry as to the mode and manner in which the state was to be brought into court, or what would be the course of proceeding, if the state declined to appear, became entirely unnecessary.

The practice seems to be well settled, that in suits against a state, if the state shall neglect to appear, on due service of process, no coercive measures will be taken to compel appearance but the complainant will be allowed to proceed *ex parte*.

Webster, in behalf of the state of Massachusetts, as her attorney and counsel in court, moved the court for leave to withdraw the plea filed in this case, on the part of the state of Massachusetts; and also the appearance which has been entered in this court, for the said state.

Hazard, counsel for the state of Rhode Island, moved the court for leave to withdraw the general replication to the defendant's plea, in bar and answer; and to amend the original bill.

Webster, in support of his motion, stated, that the governor of the state of Massachusetts had given him authority to represent the state; and to have it determined by the court, whether it had jurisdiction of the case. This authority is dated November 30th, 1833. It directs him to object to the jurisdiction, and to defend the cause. The appearance of Massachusetts was voluntary; it was not *intended, by the appearance, to admit the [*756
validity of the proceeding, or the regularity of the process. It was not supposed, that the state of Massachusetts would sustain any prejudice by this course. If the court had no jurisdiction in the matter set out in the bill, the appearance of the state represented by him would not give it. It was thought most respectful to the court, and proper in the cause, to file the plea, with an intention to move the question of jurisdiction, at a subsequent time. Nothing has been done by the state of Massachusetts since; and this court has determined not to dismiss the bill of the complainants.

The court has given an opinion in favor of their jurisdiction in the case. In the course of the argument, it appeared, that certain difficulties, which might have existed in the case, had been removed by the appearance and plea; that jurisdiction was affirmed by the appearance and plea. It was said, if the question was on the bill only, the situation of the case might be different. There is a great deal from which it may be inferred, that if Massachusetts had stood out, contumaciously, there would be no authority

in the court to proceed against her in this case. But it was not for that state to stand off, and put the court at defiance. If, then, the state, by considerations of respect; if, from a desire to have the question of jurisdiction settled, Massachusetts has appeared; this court will not permit advantage to be taken of such an act, induced by such motives, and for such a purpose.

It is the desire of the counsel for the state of Massachusetts to withdraw the plea and appearance; and to place the case in the same situation as it would have been, had there not been process. If a fair inference may be made, that the state has appeared to the process of the court, leave is asked to withdraw the appearance. It will be determined, hereafter, what course will be pursued by the state of Massachusetts.

Hazard, against the motion made by Mr. Webster, cited *Knox* v. *Summers*, 3 Cranch 421, 496. In that case, it was decided, that the appearance of the party was a waiver of all the errors in the proceedings. In that case, one of the parties was out of the jurisdiction of the court; and yet having appeared to the process, the right of the court to proceed in the case could not be denied.

*757] The authority given by the governor of the state of *Massachusetts, which is of record in this case, is ample to all the purposes of this suit. It is an authority to appear and defend the case, and to object to the jurisdiction. Can the counsel of the state disappear? If they do, they can carry nothing with them. The argument which was submitted to the court, on the motion to dismiss this cause, precludes this. They cannot disappear, and carry the plea with them.

The application is heterogeneous in its character. It is to withdraw the plea; this may be done, and the court may allow it. It is also to withdraw the appearance; this is contradictory to the other application, and is made by the state of Massachusetts denying its being bound to comply with the process, after having appeared to it.

Southard:—By the facts of the case, an answer is given to the motion on the part of the state of Massachusetts. A bill was filed on behalf of the state of Rhode Island, and an application was made for process. After advisement, the case being held over for one year, the process was ordered, and was served on the state of Massachusetts. The state then gave a written authority to counsel to appear in the cause, to object to the jurisdiction, and to do whatever was necessary in the suit; and an appearance was entered.

After this, a plea was put in to the merits, and not a demurrer to the jurisdiction of the court. The delay of the state of Rhode Island to proceed in the case, can have no effect on the cause. The question is, whether, after appearance, plea and answer, the party can withdraw from the cause, and the cause stand as if no appearance had been entered.

The appearance of the counsel for the state of Massachusetts was general; and it was followed by an application for a continuance, and for leave to plead, answer or demur. At the following term, in January 1835, a plea and answer were filed. At the January term 1836, an agreement was made by the counsel in the cause, that the complainant should file a replication within six months. This was done; and in 1837, the application of one of the counsel for the complainant for a continuance was opposed, and was

argued by the counsel for the state of Massachusetts. Thus, the whole action of the counsel for the defendant was such as a party fully before the court would adopt and pursue. There was no question made as to the jurisdiction. The appearance was not followed by a motion to dismiss the bill on that ground; nor was the general appearance explained by its being followed by such a motion. After all these proceedings on behalf *of the [*758
state of Massachusetts, and after the lapse of four years from the appearance of the state, by the authority of the governor, giving full power to counsel to act in the cause, a motion to dismiss the cause, for want of jurisdiction, was made by the state of Massachusetts, and was argued. This motion having failed, the court are now asked to consider the case as if Massachusetts had not appeared; and as if process had not been issued in the cause.

It appears, that upon a statement of the case, no further reply to the application on the part of the state of Massachusetts is necessary. The purpose of it is to avoid the effect of the judgment of this court on the motion to dismiss this bill, to withdraw from the cause. This could not be done in a private case; and why should it be allowed in a case between states? The counsel seems to found his motion on something in the case, by which it would appear that if no appearance had been entered, the court would not have taken jurisdiction of the cause; and desires, therefore, to put herself in the situation he would have been in had he not appeared. Suppose, a demurrer to this jurisdiction had been put in, could the party, after the question had been argued, and decided against the demurrer, move to dismiss the case for want of jurisdiction. This was never heard of.

Webster, in reply:—The authority to the counsel for the state of Massachusetts to appear in the cause, is no part of the record, and is no part of the case. The object of the motion is, that if anything has been done by Massachusetts to her prejudice, she may have liberty to withdraw it. She has done it by mistake—process having been issued against her, she came in and appeared to it.

Is it considered, that this court has a right to issue process against a state; and that it is the duty of the state to obey the process? If this is so, there is an end of the motion. But if the right of the court to issue process is not determined, and yet the process has been issued, and the state of Massachusetts has come in, and has appeared; although there was no right to issue the process, the state should sustain no prejudice from having appeared for the purpose of having the question of jurisdiction settled. It is yet to be determined, whether the court can issue process against a state; and Massachusetts is not to be entrapped by anything done by her, before this shall be decided. If the state of Massachusetts, from respect to the *court, has appeared, she asks the court to say that there is a right [*759
to issue process against a state, and she will obey; but if wrongfully issued, she asks that she shall not be affected by what she has done.

Thompson, Justice, delivered the opinion of the court.—A motion has been made on the part of the state of Massachusetts, for leave to withdraw the plea filed on the part of that state; and also to withdraw the appearance heretofore entered for the state. A motion has also been made on the part of Rhode Island, for leave to withdraw the general replication to the de-

fendant's answer and plea in bar; and to amend the original bill filed in this case.

The motion, on the part of the state of Massachusetts, to withdraw the appearance heretofore entered, seems to be founded on what is supposed to have fallen from the court at the present term, in the opinion delivered upon the question of jurisdiction in this case. It is thought that opinion is open to the inference, that jurisdiction is assumed, in consequence of the defendant's having appeared in the cause. We did not mean to put the jurisdiction of the court upon that ground. It was only intended to say, that the appearance of the state superseded the necessity of considering the question whether any and what course would have been adopted by the court, if the state had not appeared. We certainly did not mean to be understood, that the state had concluded herself, on the ground that she had voluntarily appeared; or that if she had not, we could not have assumed jurisdiction of the case. But being satisfied that we had jurisdiction of the subject-matter of the bill, so far at least as respected the question of boundary, all inquiry as to the mode and manner in which the state was to be brought into court, or what would be the course of proceeding, if the state declined to appear, became entirely unnecessary. But as the question is now brought directly before us, it becomes necessary to dispose of it. We think, however, that the course of decision in this court, does not leave us at liberty to consider this an open question.

In the case of the *State of New Jersey* v. *State of New York*, 5 Pet. 287, this question was very fully examined by the court, and the course of practice considered as settled by the former decisions of the court, both before and after the amendment of the constitution; which declared, that the judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against a state, by citizens of another
*760] state, or subjects of any *foreign state. This amendment did not affect suits by a state against another state; and the mode of proceeding in such suits, was not at all affected by that amendment.

We do not propose to enter into this question, any further than briefly to notice what the court has already decided upon the practice in this respect. These cases were reviewed in the case referred to, of *New Jersey* v. *New York;* and the practice found to have been established by former decisions of the court, so far as it went, was adopted. And the court went a step farther, and declared, what would be the course of proceeding in a stage of the cause, beyond which former decisions had not found it necessary to prescribe such course. The court, in the case of *New Jersey* v. *New York*, commence the opinion, by saying: "This is a bill filed for the purpose of ascertaining and settling the boundary between the two states." And this is precisely the question presented in the bill now before us. And it is added, that congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state. The precise question was, therefore, presented, whether the existing legislation of congress was sufficient to enable the court to proceed in such a case; without any special legislation for that purpose. And the court observed, that at a very early period of our judicial history, suits were instituted in this court, against states; and the questions concerning its jurisdiction were necessarily considered. An examination of the acts of congress, in relation

to process and proceedings, and the power of the court to make and establish all necessary rules for conducting business in the courts, is gone into, and considered sufficient to authorize process and proceedings against a state; and the court adopted the practice prescribed in the case of *Grayson* v. *Commonwealth of Virginia*, 3 Dall. 320, that when process at common law or in equity shall issue against a state, it shall be served on the governor, or chief executive magistrate, and the attorney-general of the state. The court, in that case, declined issuing a *distringas*, to compel the appearance of the state; and ordered, as a general rule, that if the defendant, on service of the *subpœna*, shall not appear at the return-day therein, the complainant shall be at liberty to proceed *ex parte*. And the course of practice has since been to proceed *ex parte*, if the state does not appear. *And accordingly, in several cases, on the return of the process, orders have been [*761 entered, that unless the state appear by a given day, judgment by default will be entered; and further proceedings have been had in the causes. In the case of *Chisholm's Executors* v. *State of Georgia*, 2 Dall. 419, judgment by default was entered, and a writ of inquiry awarded, in February term 1794. But the amendment of the constitution prevented its being executed. And in other cases, commissions have been taken out for the examination of witnesses.

By such proceedings, therefore, showing progressive stages in cases towards a final hearing, and in accordance with this course of practice; the court, in the case of *New Jersey* v. *New York*, adopted the course prescribed by the general order made in the case of *Grayson* v. *Commonwealth of Virginia*; and entered a rule, that the *subpœna* having been returned, executed sixty days before the return-day thereof, and the defendant having failed to appear, it is decreed and ordered, that the complainant be at liberty to proceed *ex parte*; and that unless the defendant, on being served with a copy of this decree, shall appear and answer the bill of the complainant, the court will proceed to hear the cause on the part of the complainant, and decree on the matter of the said bill. So that the practice seems to be well settled, that in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measure will be taken to compel appearance; but the complainant, or plaintiff, will be allowed to proceed *ex parte*.

If, upon this view of the case, the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given; and the state of Rhode Island may proceed *ex parte*. And if the appearance is not withdrawn, as no testimony has been taken, we shall allow the parties to withdraw or amend the pleadings; under such order as the court shall hereafter make.

BALDWIN, Justice, dissented.

STORY, Justice, did not sit in this case.

ON consideration of the motion made by Mr. Webster, on Saturday, the 24th of February, A. D. 1838, for leave to withdraw the *plea filed [*762 on the part of the defendant, and the appearance heretofore entered for the defendant; and also of the motion made by Mr. Hazard, on the

same day of the present term, for leave to withdraw the general replication to the defendant's answer and plea in bar, and to amend the original bill filed in this case, and of the arguments of counsel thereupon had, as well for the complainant as for the defendant; it is now here considered and ordered by the court, that if the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, that leave be and the same is accordingly hereby given; and that the state of Rhode Island may proceed *ex parte*. But that, if the appearance be not withdrawn, that then, as no testimony has been taken, the parties be allowed to withdraw or amend the pleadings, under such order as the court shall herafter make in the premises.

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BOUNDARIES OF STATES.

1. The boundary established and fixed by compact between nations, becomes conclusive upon all the subjects and citizens thereof, and binds their rights; and is to be treated, to all intents and purposes, as the true real boundary. The construction of such compact is a judicial question. *Rhode Island* v. *Massachusetts*.....*657
2. There can be but two tribunals under the constitution who can act on the boundaries of states—the legislative or the judicial power; the former is limited, in express terms, to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this court, when a state is a party, the power is here, or it cannot exist.....*Id.*
3. The supreme court exists by a direct grant from the people of their judicial power; it is exercised by their authority, as their agent selected by themselves, for the purposes specified; the people of the states, as they respectively became parties to the constitution, gave to the judicial power of the United States, jurisdiction over themselves, controversies between states, between citizens of the same or different states, claiming lands under their conflicting grants, within disputed territory.....*Id.*
4. No court acts differently in deciding on boundary between states, than on lines between separate tracts of land; if there be uncertainty where the line is; if there be a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time, or other kindred causes; it is a case appropriate to equity. An issue at law is directed; a commission of boundary awarded; or, if the court are satisfied, without either, they decree what and where the boundary of a farm, a manor, province or a state is and shall be.....*Id.*
5. There is neither authority of law nor reason for the position, that boundary between nations or states is, in its nature, any more a political question than any other subject on which they may contend. None can be settled without war or treaty, which is by political power; but, under the old and new confederacy, they could, and can, be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before.....*Id.*

See SUPREME COURT.

CASES CITED.

1. Deneale *v.* Stump's Executors, 8 Pet. 526;

and Owings *v.* Kincannon, 7 Ibid. 399. *Wilson* v. *Life and Fire Insurance Company of New York*.....*140

2 Dubois' Lessee *v.* Hepburn, 10 Pet. 1. *Hepburn* v. *Dubois' Lessee*.....*345

3. Morgan's Heirs *v.* Morgan, 2 Wheat. 290; Mollan *v.* Torrance, 9 Ibid. 537; and Dunn *v.* Clarke, 8 Pet. 1. *Clarke* v. *Mathewson*.....*165

4. New York *v.* New Jersey, 5 Pet. 287; Grayson *v.* Virginia, 3 Dall. 320; Chisholm's Executors *v.* Georgia, 2 Ibid. 419. *Massachusetts* ads. *Rhode Island*.....*757

5. United States *v.* Bailey, 9 Pet. 367. *White* v. *Turk*.....*238

6. United States *v.* State Bank of North Carolina, 6 Pet. 29; United States *v.* Amedy, 11 Wheat. 392; United States *v.* Fisher, 2 Cranch, 358; United States *v.* Hooe, 3 Ibid. 73; Price *v.* Bartlett, 8 Ibid. 431, Conrad *v.* Atlantic Insurance Co., 1 Pet. 439; Conrad *v.* Nicholl, 4 Ibid. 308; Brent *v.* Bank of Washington, 10 Ibid. 596; Hunter *v.* United States, 5 Ibid. 173. *Beaston* v. *Farmers' Bank of Delaware*.....*102

7. The decision of the court in the case of Foster *v.* Neilson, 2 Pet. 254, by which grants made by the crown of Spain, after the treaty of St. Ildefonso, of lands west of the river Perdido, and which were, by the United States, declared to be within the territory of Louisiana, ceded by France to the United Stases, were declared void, affirmed. *Garcia* v. *Lee*.....*511

CERTIFICATES OF DIVISION.

1. Where a case is certified from a circuit court, the judges of the circuit court having differed in opinion upon questions of law which arose on the trial of the cause; the supreme court cannot be called upon to express an opinion on the whole facts of the case, instead of upon particular points of law, growing out of the same. *Adams* v. *Jones*.....*207

2. The intention of congress, in passing the act authorizing a division of opinion of the judges of the circuit courts to be certified to the supreme court was, that a division of the judges of the circuit court, upon a single and material point in the progress of the cause, should be certified to the supreme court for its opinion; and not the whole cause. When a certificate of division brings up the whole cause, it would be, if the court should decide it, in effect, the exercise of original, rather than appellate jurisdiction. *White* v. *Turk*.....*238

CHANCERY AND CHANCERY PRACTICE.

1. Courts of chancery will not relieve for mistakes of fact. *Bank of United States* v. *Daniels*.....*32

2. Courts of equity are bound by statutes of limitation as courts of law.....*Id.*

3. The decree of the circuit court of the district of Columbia, dismissing a bill filed by the corporation of Georgetown, on behalf of themselves and the citizens of Georgetown, against the Alexandria Canal company, chartered by congress, praying that the company should be enjoined from building piers in the river Potomac, the erection of the same being an obstruction to the navigation of the river, and injuring its navigation, was affirmed. *Georgetown* v. *Alexandria Canal Company*.....*91

4. The jurisdiction of courts of chancery, in cases of nuisance, may be exercised in those cases in which there is imminent danger of irreparable mischief, before the tardiness of the law could reach it.....*Id.*

5. In what cases, and under what principles, it is competent for some persons to come into chancery, for themselves and others, having similar interests.....*Id.*

6. The rule in chancery is, if the answer of the defendant admits a fact, but insists on matter by way of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance. *Clarke* v. *White*.....*178

7. In equity, as in law, fraud and injury must concur to furnish ground for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognisance; fraud ought not to be conceived; it must be proved and expressly found.....*Id.*

8. The complainants in their bill alleged, that a conveyance of her real estate was made by a daughter to her father, for a nominal consideration; the answer denied the matter stated in the bill; and the defendants gave evidence of the transfer of stock, to the value of $2000, on the day the conveyance was made, claiming that this was also the consideration in the deed: *Held*, that this evidence was admissible, without an amendment of the answer; it rebutted the allegation in the bill, that the deed was made wholly without consideration. *Jenkins* v. *Pye*.....*241

9. Where a defect of title to land sold was discovered by the vendee, after his purchase, and he proceeded to perfect the title in himself, and thus defeat the right of the vendor to the land, and he claimed a rescission of the contract of purchase, and a repayment of the sum paid by him for the land, it was *held*,

that he could not avail himself of the defect of title, while standing in the relation of purchaser, to defeat his agreement to make the purchase; he could, under the most favorable circumstances, only have the contrace reformed, and the amount advanced to perfect the title, deducted from the unpaid purchase-money. A court of equity will not rescind such a contract of purchase, and will, on a bill filed by him to have such a contract rescinded, decline giving its aid against the vendors, to obtain the expenses of perfecting the title. *Galloway* v. *Finley*....*2

10. It is an established rule in equity, that when a vendor of land has not the power to make a title, the vendee may, before the time of performance, enjoin the payment of the purchase-money, until the ability to comply with the agreement is shown; but then, the court will give a reasonable time to procure the title, if it appears probable that it may be procured..... *Id.*

11. In reforming a contract for the sale of lands, equity treats the purchaser as a trustee for the vendor, because he holds under the vendor; and acts done to benefit the title, by the vendee, when in possession of the lands, inure to the benefit of him under whom the possession was obtained, and through whom the knowledge that a defect in the title existed was derived; the vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title..... *Id.*

12. A bill of exceptions is altogether unknown in chancery practice; nor is a court of chancery bound to inscribe in an order-book, upon the application of one of the parties, an order which it may pass in a case before it. *Ex parte Story*..... *339

13. In a proceeding by a bill and *subpœna* in chancery, in the circuit court of the United States of Louisiana, against upwards of 200 defendants, some of the latter appeared, and an affidavit was made, that in consequence of an epidemic in New Orleans and at La Fayette, and the absence of many of the defendants, it had been impossible for them to prepare for their defence, and they prayed time for the same; the circuit court allowed the defendants until the following term to appear and make defence. The conduct of the circuit court appears to have been strictly conformable to the practice and principles of a court of equity. *Poultney* v. *City of La Fayette*..... *472

14. Every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice. And it is not only in the power of the court but it is its duty, to exercise a sound discretion upon this subject; and to enlarge the time whenever it shall appear, that the purposes of justice require it; the rules in chancery proceedings in the circuit courts, prescribed by this court, do not, and were not intended to, deprive the courts of the United States of this well-known and necessary power..... *Id.*

CHARGE OF THE COURT.

1. The court is not bound to give any hypothetical direction to the jury, and to leave them to find a fact, where no evidence of such fact is offered, nor any evidence from which it can be inferred. *McNeil* v. *Holbrook*..... *84

2. Where the items of an account stated were not disputed, but were admitted, and payment of the same demanded, it was not taking the question of fact, whether the account was a stated account, from the jury, for the court to instruct the jury that the account was a stated account. *Toland* v. *Sprague*..... *300

CIRCUIT COURTS.

1. The circuit court of each district sits within and for that district, and is bounded by its local limits; whatever may be the extent of the jurisdiction of the circuit court over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union; it has not done so; it has not, in terms, authorized any civil process to run into any other district; with the single exception of *subpœnas* to witnesses within a limited distance. In regard to final process, there are two cases, and only two, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons in another district of the same state; and the other in favor of the United States, in any part of the United States. *Toland* v. *Sprague*.....*300

See Foreign Attachment.

CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

1. The circuit court of the district of Columbia has jurisdiction to issue a *mandamus* to the postmaster-general of the United States.

commanding him to credit the amount found due to certain contractors for carrying the mail of the United States; the amount due to the contractors having been ascertained by the solicitor of the treasury of the United States, acting under an act of congress, referring the accounts to him. *Kendall* v. *United States*..... *524

See DISTRICT OF COLUMBIA: MANDAMUS.

COMMERCE.

See CONSTITUTIONAL LAW, 1.

COMMISSIONERS.

1. The acts of the commissioners appointed to adjust and settle land-titles in Louisiana, under the acts of congress authorizing and confirming the same; are conclusive as to all titles to lands which have been confirmed, according to the provisions of the different acts of congress on the subject. *Strother* v. *Lucas*.. ..... *410

COMMON LAW.

1. At the date of the act of congress establishing the government of the district of Columbia, the common law of England was in force in Maryland; and, of course, remained and continued in force in the part of the district ceded by Maryland to the United States. The power to issue a *mandamus* in a proper case, is a part of the common law; and it has been fully recognised as in practical operation in a case decided in the court of that state. *Kendall* v. *United States*..*524

See CIRCUIT COURT OF THE DISTRICT OF COLUMBIA: DISTRICT OF COLUMBIA: MANDAMUS.

COMPACTS BETWEEN STATES.

1. Compact between Virginia and Maryland, relative to the river Potomac. *Georgetown* v. *Alexandria Canal Co.*.....*91
2. The act of congress, which granted the charter to the Alexandria Canal company, is in no degree a violation of the compact between the states of Virginia and Maryland; nor of any of the rights that the citizens of either, or both states, claimed as being derived from it.....*Id.*

COMPOSITION WITH CREDITORS.

1. It is generally true, in cases of composition, that the debtor who agrees to pay a less sum in the discharge of a contract, must pay punctually; if the agreement stipulates for partial payments, and the debtor fails to pay, the condition to take part is broken, the second contract forfeited; and is no bar to the original cause of action. *Clarke* v. *White*.....*178
2. In a composition for a debt, by which one party agreed to deliver goods to the amount of seventy per cent., in satisfaction of a debt exceeding $10,000, and omitted to deliver within one dollar and forty-one cents of the amount, the mistake is too trivial to deserve notice.....*Id.*
3. If, upon failure or insolvency, one creditor goes into a contract of general composition common to the others; at the same time, having an under-hand agreement with the debtor, to receive a larger per cent.; such agreement is fraudulent and void.. ....*Id.*
4. The rule cutting off under-hand agreements, in cases of joint and general compositions, as a fraud upon the other compounding creditors, and because such agreements are subversive of sound morals and public policy, has no application to a case where each creditor acts not only for himself, but in opposition to every other creditor; all equally relying on their vigilance to gain a priority which, if obtained, each being entitled to have satisfaction, cannot be questioned..*Id.*

CONQUEST.

1. Even in cases of conquest, the conqueror does no more than displace the sovereign and assume dominion over the country; "a cession of territory is never understood to be a cession of the property of the inhabitants; the king cedes only that which belongs to him; lands he had previously granted, were not his to cede. Neither party could so understand the Louisiana treaty; neither party could consider itself as attempting a wrong to individuals, condemned by the whole civilized world; 'the cession of a territory' should necessarily be understood to pass the sovereignty only, and not to interfere with private property." No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would, without express stipulutions, have conferred, would seem to be admissible, further than its positive words require. "Without it, the title of individuals would remain as valid under the new government, as they were under the old; and those titles, at least, so far as they were consummate, might be asserted in the courts of the United States, independently of this article." *Strother* v. *Lucas* *410

CONSTITUTIONAL LAW.

1. Under the clause of the constitution giving a power to congress "to regulate commerce with foreign nations, and among the several states," congress possesses the power to punish offences of the sort enumerated in the 9th section of the act of 1825. The power to regulate commerce, includes the power to regulate navigation, as connected with the commerce with foreign nations, and among the states; it does not stop at the mere boundary line of a state; nor is it confined to acts done on the waters, or in the necessary course of the navigation thereof; it extends to such acts done on land, which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the states. Any offence which thus interferes with, obstructs or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. *United States* v. *Coombs*..*76
2. Although the constitution does not, in terms, extend the judicial power to all controversies between two or more states; yet, it in terms excludes none, whatever may be their nature or subject. *Rhode Island* v. *Massachusetts*.*657
3. The supreme court, in construing the constitution as to the grants of powers to the United States, and the restrictions upon the states, has ever held, that an exception of any particular case pre-supposes that those which are not excepted, are embraced within the grant of prohibition; and have laid it down as a general rule, that where no exception is made, in terms, none will be made by mere implication or construction.....*Id.*
4. In the construction of the constitution, the court must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy. *Id.*
5. The supreme court cannot presume that any state which holds prerogative rights for the good of its citizens, and, by the constitution, has agreed, that those of any other state shall enjoy rights, privileges and immunities in each as its own do, would either do wrong, or deny right, to a sister state, or its citizens; or refuse to submit to those decrees of the supreme court, rendered pursuant to its own delegated authority, when in a monarchy, its fundamental law declares that such decree executes itself.....*Id.*
6. In the case of Olmstead, the supreme court expressed its opinion, that if state legislatures may annul the judgments of the courts of the United States, and the rights thereby acquired, the constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by its own tribunal. So fatal a result must be deprecated by all; and the people of every state must feel a deep interest to resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.....*Id.*

See BOUNDARIES OF STATES: JURISDICTION: SUPREME COURT.

CONSTRUCTION OF STATE STATUTES.

1. The supreme court, in accordance to a steady course of decision for many years, will carefully examine and ascertain if there be a settled construction by the state courts of the statutes of the respective states, where they are exclusively in force; and abide by and follow such construction, when found to be settled. *Bank of the United States* v. *Daniels*.....*32

CONSTRUCTION OF UNITED STATES STATUTES.

1. If a section of an act of congress admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of congress; it is the duty of the supreme court to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority; unless that conclusion is forced on the court by language altogether unambiguous. *United States* v. *Coombs*..*72
2. Upon the general principles of interpreting statutes, where the words are general, the court are not at liberty to insert limitations not called for by the sense, or the objects, or the mischiefs of the enactment.....*Id.*

CRIMES.

See JURISDICTION, 5.

DEBT.

1. An action of debt was instituted in the district court of the United States, on an obligation under the hands and seals of two persons; the action was against one of the parties to the instrument. The laws of Mississippi allow an action on such an instrument to be maintained against one of the parties only. *Rodgers* v. *Batchelor*....*217

DECISIONS OF STATE COURTS.

1. The supreme court, in accordance to a steady course of decision for many years, feels it to be an incumbent duty, carefully to examine and ascertain if there be a settled construction by the state courts of the statutes of the respective states, where they are exclusively in force; and to abide by and follow such construction, when found to be settled. *Bank of United States* v. *Daniels*.....*32.
2. By the act of the legislature of Georgia, of 15th December 1810, the assignment or indorsement of a promissory note is made sufficient evidence thereof, without the necessity of proving the handwriting of the assignor. The judiciary act of 1789 declares, that the laws of the several states, except when the constitution, treaties or statutes of the United States require otherwise, are to be rules of decision in the courts of the United States, in trials at common law, where they apply. The court does not perceive any sufficient reason for construing this act of congress so as to exclude from its provisions those statutes of the several states, which prescribe rules of evidence in civil cases, in trials at common law. *McNeil* v. *Holbrook*.....*84
3. The object of the law of congress was, to make the rules of decision of the courts of the United States, the same with those of the states; taking care to preserve the rights of the United States, by the exceptions contained in the section of the judiciary act. Justice to the citizens of the United States required this to be done; and the natural import of the words used in the act of congress, includes the laws in relation to evidence, as well as the laws in relation to property.....*Id.*

DEED OF FEME COVERT.

1. The deed of a *feme covert*, conveying her interest in lands which she owns in fee, does not pass her interest, by the force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity. In such cases, an acknowledgment gives no additional effect between the parties to the deed; it operates only as to third persons, under the provisions of recording and kindred laws. The law presumes a *feme covert* to act under the coercion of her husband, unless before a court of record, a judge, or some commissioner, in England, by a separate acknowledgment, out of the presence of her husband, or, in these states, before some court, or judicial officer authorized to take and certify such acknowledgment, the contrary appears. *Hepburn* v. *Dubois's Lessee*.....*345

DISTRICT OF COLUMBIA.

1. There is, in the district of Columbia, no division of powers between the general and state governments; congress has the entire control over the district, for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department in this district all the judicial power necessary for the purposes of government, would be vested in the courts of justice. *Kendall* v. *United States*.....*524

See COMMON LAW: MANDAMUS.

DOWER.

1. The doctrines of the common law, on the subject of dower, although since altered by an act of assembly in Maryland, were still the law of Maryland, when the United States assumed jurisdiction over the district of Columbia; and the act of congress of February 27th, 1801, which provides for its government, declares that the laws of Maryland, as they then existed, should continue and be in force in that part of the district which was ceded by that state. *Stille* v. *Carroll*.....*201
2. According to the principles of the common law, a widow was not dowable in her husband's equity of redemption; and if a man mortgages in fee, before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower.....*Id.*
3. Mortgages were made during the coverture, but the mortgage deeds were acknowledged by the wife, upon privy examination; and these acknowledgments, under the acts of assembly of Maryland of 1715, ch. 47, and 1766, ch. 14, bar the right of dower in the lots thus conveyed to the mortgagee. The legal estate passed to the mortgagee; and the husband retained nothing but the equity of redemption; and as the wife had no right of dower in this equitable interest, a subsequent deed, executed by the husband, conveyed the whole of his interest in the estate, and was a bar to the claim of dower. It was not necessary for the wife to join in such a deed, as she had no right of dower in the equity of redemption, which was conveyed by the deed.....*Id.*

EJECTMENT.

1. As there is no court of chancery of Pennsylvania, an action of ejectment is sustained on

an equitable title, by the courts of that state. *Swayze* v. *Burke*.....*11

2. The plaintiff had brought an ejectment, which was before the court on a writ of error, in 1832, and the judgment in favor of the defendant was affirmed. (6 Pet. 763.) He afterwards brought another action of ejectment for the same land. Had this case been identical with the former, as to the merits, we should have followed the deliberate opinion delivered therein; but as one judgment in ejectment is not conclusive on the right of either possession or property in the premises in controversy, the plaintiff has a right to bring a new suit; and the court must consider the case, even it is in all respects identical with the former, though they may hold it to be decided by the opinion therein given. It is otherwise, when the second case, presents a plaintiff's or defendant's right, on matters of law or fact, material to its decision, not before appearing in the record; it then becomes the duty of the court to decide all pertinent questions arising on the record, in the same manner as if the case came before them for the first time, save such as arise on evidence identical as to the merits. In this case, it is a peculiar duty, enjoined upon us by the nature of the case, the course of the able and learned arguments as to the laws of Spain and her colonies, in its bearing on the interesting question before us, together with a view of the consequences of our final decision thereon. Were the court to leave any questions undecided, which fairly arise on the record, or to decide the cause or points of minor importance only, the value of the premises would justify future litigation; which no court of chancery might think proper to enjoin, so long as new and material facts could be developed, or pertinent points of law remain unsettled. *Strother* v. *Lucas*.....*410

EVIDENCE.

1. Where all the books, papers and vouchers of a clerk in the treasury, who had been a disbursing officer, relating to his disbursements and agency, have been destroyed by fire, without any fault of his; the case is, of necessity, open to the admission of secondary evidence; and under the general rule of evidence, he might be required to produce the best evidence which the nature of the case, under the circumstances, would admit. This rule, however, does not require of a party the production of the strongest possible evidence, but must be governed, in a great measure, by the circumstances of the case; and must have a bearing upon the matter in controversy; and must not be such as to leave it open to the suspicion or presumption, that anything left behind, and within the power of the party, would, if produced, make again, him. *United States* v. *Laub*.....*1

2. It appeared, that the defendant offered to read in evidence, certain passages from a public document, mentioned in the bill of exceptions; the plaintiff's counsel consented to its being read, as the defendant's evidence; and after the same was read, the plaintiff's counsel requested the court to instruct the jury, that the conversation of defendant with Mr. Dicksons and Mr. McLean, read from the executive document, was not evidence to the jury, of the facts stated in such conversation, which instruction the court refused to give. The entire document referred to, is not set out in the bill of exceptions; and from what is stated, no conversation of the character objected to appears; but the evidence was admitted by consent; the plaintiffs were entitled to have the whole document read; and it was all in evidence before the court and jury. But the objection, on the ground, that some of the facts stated were only hearsay evidence, fails; the document, so far as it appears on the bill of exceptions contains no such conversation. This instruction, was, therefore, properly refused.....*Id.*

3. In an action on four promissory notes, one of which was made by the defendant in favor of the plaintiff, and the others were made by the defendant in favor of other persons, who had indorsed them to the plaintiff; parol evidence was properly admitted, that the defendant acknowledged that he was indebted to the plaintiff in the amount of the notes, and offered to confess judgment, in the course of a negotiation with the plaintiff's counsel, although the negotiation fell through and although no proof was given of the handwriting or signatures of the indorsers of the notes. This case does not come within the reason or principles of the rules which excludes offers to pay, made by way of compromise upon a disputed claim, and to buy peace. *McNeil* v. *Holbrook*.....*84

4. The admissions of a defendant, that he is indebted to the plaintiff on promissory notes, when proved by competent testimony, are sufficient evidence of the transfer of negotiable paper, without proof of the handwriting of the payee. Whether the evidence was legally competent for that purpose, or not, is a question for the court, and not for the jury, in the absence of all contradictory testimony.....*Id*

5. By the act of the legislature of Georgia, of

15th December 1810, the assignment or indorsement of a promissory note is made sufficient evidence thereof, without the necessity of proving the handwriting of the assignor. The judiciary act of 1789 declares, that the laws of the several states, except when the constitution, treaties or statutes of the United States require otherwise, are to be rules of decision in the courts of the United States, in trials at common law, where they apply. The court does not perceive any sufficient reason for construing this act of congress so as to exclude from its provisions, those statutes of the several states which prescribe rules of evidence in civil cases, in trials at common law..... *Id.*

6 Where the grantor of an annuity, by deed, has conveyed all the interests in the property charged with the annuity, and an allegation of usury in the granting of the annuity is afterwards made, he may be a witness to prove usury; if he is not a party to the suit, and has conveyed all his right and title to the property to others, his creditors, thus divesting himself of all interest arising out of the original agreement, and is released from his debts by them, and is not liable to the costs of the suit. *Scott* v. *Lloyd*...*145

7. The decision in Pet. C. C. 301 (Willings *v.* Consequa), where the court held, that a party named on the record might be released, so as to constitute him a competent witness, was cited in the argument. The court said, such a rule would hold out to parties a strong temptation to perjury, and we think it is not sustained either by principle or authority..... *Id.*

8. Evidence will be legal, as rebutting testimony, as, to repel an imputation of charge of fraud, which would not be admissible as original evidence. *Zacharie* v. *Franklin.**151

9. It is error, on the trial of a writ of right, before the grand assize, to prevent the introduction of written evidence, because in a trial of another cause, between the demandant, offering the testimony, and a defendant claiming in opposition to the demandant, under the same title with that of the defendant, before the grand assize, the court had frequently examined the title set up by the written evidence offered, and had become fully cognisant of it; and had, in that trial, at the suit of the demandant, in which it had been produced, decided that it in no wise tended to establish a legal title to the land in controversy in the demandant. *Bradstreet* v. *Thomas*..... .....*174

10. The demandant had a right to place before the assize all the evidence which she thought might tend to establish her right of property, which had been ruled to be competent evidence in another suit; against the competency of which, nothing was objected in this suit; and the assize had a right to have such evidence before them, that they might apply to it the instructions of the court, as the law of the case, without which they could not do it..... *Id.*

11. There is a safer repository of the adjudications of courts, than the remembrance of judges; and their declaration of them, is no proof of their existence..... *Id.*

12. In a case in equity, brought by appeal from the court of appeals of East Florida, the contents of certain documents which contained the agreements of the parties, were stated to be set out in the bill; the contracts were not proved in the cause, by testimony, nor was their non-production accounted for by secondary evidence. The decrees of the Florida courts were reversed, and the cause remanded to the court of appeals, to allow the pleadings to be amended, and the documents referred to, or the contents of the same, to be duly authenticated and proved, &c. *Levy* v. *Arredondo*.....*218

13. Where the evidence in a cause conduces to prove a fact in issue before a jury, if it is competent in law, a jury may infer any fact from such evidence which the law authorizes a court to infer on a demurrer to evidence. After a verdict in favor of either party, on the evidence, he has a right to demand of a court of error, that they look to the evidence only for one purpose, with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which made out the right of the party, on a part or the whole of his case; if, in its judgment, the appellate court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferrible therefrom; in the same manner, and with the same legal results as if they had been definitely set out in a special verdict. So, on the other hand, the finding of a jury on the whole evidence in a cause, must be taken as negativing all the facts in which the party against whom their verdict is given, has attempted to infer from, or establish from, the evidence. *Hepburn* v. *Dubois's Lessee*.....*345

14. A translation by the secretary of the board of land-commissioners of Florida, whose duty it was to translate Spanish documents given in evidence before the board of commissioners, of a certified copy of a Spanish grant of land in Florida, which had been produced to the board, was properly admitted as evidence of the grant; satisfactory proof having been given to the court, that the original grant could not be found in the records

of East Florida; and that this was the best evidence, from the nature of the case, which could be given of the existence of the original paper, lost or destroyed. *United States* v. *Delespine's Heirs*.....*654

FLORIDA LAND CLAIMS.

1. A grant of land in East Florida was made by the governor, before the cession of Florida by Spain to the United States, on conditions which were not performed by the grantee, within the time limited in the grant; or any exertions made by him to perform them. No sufficient cause for the non-performance of the conditions having been shown, the decree of the supreme court of East Florida, which confirmed the grant, was reversed. *United States* v. *Mills's Heirs*.*215
2. A grant for land in Florida, by Gov. Coppinger, on condition that the grantee build a mill, within a period fixed in the grant, was declared to be void; the grantee not having performed the condition, nor shown sufficient cause for its non-performance. *United States* v. *Kingsley*.....*476
3. Under the Florida treaty, grants of land made before the 24th January 1818, by his Catholic Majesty, or by his lawful authorities, stand ratified and confirmed, to the same extent that the same grants would be valid, if Florida had remained under the dominion of Spain; and the owners of conditional grants, who have been prevented from fulfilling all the conditions of their grants, have time, by the treaty, extended to them, to complete such conditions. That time, as was declared by the supreme court in Arredondo's Case, 6 Pet. 478, began to run, in regard to individual rights, from the ratification of the treaty; and the treaty declares, if the conditions are not complied with, within the terms limited in the grant, that the grants shall be null and void.....*Id.*
4. In the construction of the Florida treaty, it is admitted, that the United States succeeds to all those equitable obligations which we are to suppose would have influenced his Catholic Majesty, to secure their property to his subjects, and which would have been applied by him in the construction of a conditional grant, to make it adsolute; and further, that the United States must maintain the rights of property under it, by applying the laws and customs by which those rights were secured, before Florida was ceded; or by which an inchoate right of property would, by those laws and customs, have been adjudicated by the Spanish authority to have become a perfect right. *Id.*

See LOUISIANA AND FLORIDA TREATIES.

FOREIGN ATTACHMENT.

1. Process of foreign attachment cannot be properly issued by the circuit courts of the United States, in cases where the defendant is domiciled abroad, or not found within the district in which the process issues, so that it cannot be served upon him. *Toland* v. *Sprague*.....*300
2. By the general provisions of the laws of the United States: 1. The circuit courts can issue no process beyond the limits of their districts. 2. Independently of positive legislation, the process can only be served upon persons within the same districts. 3. The acts of congress adopting the state process, adopted the form and modes of service only, so far as the persons are rightfully within the reach of such process; and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4. The right to attach property to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the circuit court, *in personam;* that is, where they are inhabitants, or found within the United States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here.....*Id.*
3. In the case of a person being amenable to process, *in personam*, an attachment against his property cannot be issued against him; except as a part of, or together with, process to be served upon his person.....*Id.*
4. A party against whose property a foreign attachment has issued, in a circuit court of the United States, although the court had no right to issue such attachment, having appeared to the suit, and pleaded to issue, cannot afterwards deny the jurisdiction of the court. The party had, as a personal privilege, a right to refuse to appear; but it was also competent to him to waive the objection.....*Id.*

FRAUD.

1. The administrator of his father, who left a valuable estate in the county of Allegheny, Pennsylvania, suffered the estate to be sold by the sheriff, for a debt due by the intestate, and the estate was purchased by the attorney of the creditor, for a considerable sum beyond the debt; who, after holding it for some time, conveyed it to the administrator, by deed, vesting the estate in him, in his own right, he having been paid the amount of the debt due by the intestate. The administrator, to an application made

to him by a legal heir and a grandchild, who lived in the state of Mississippi, represented that the intestate had not left more property than would pay his debts; there was evidence that less than one-tenth of the real estate of the intestate would have satisfied the judgment for what it was sold; the administrator claimed the property conveyed to him as his own, and to exclude all claims to it by the grandchild of the intestate: *Held*, that no title to the estate, against the claim of the co-heir of the intestate, was acquired under the deed made to him by the attorney of the creditor; and that in a proceeding in ejectment by the co-heir, to recover her part of the real estate, in order to maintain the suit, it was not necessary to prove that the purchaser at the sheriff's sale participated in the fraud, in order to enable the co-heir to recover in an ejectment. *Swayze* v. *Burke*.....*11

2. That fraud is cognisable in a court of law, as well as in a court of equity, is a well-established principle; it has often been so ruled in the supreme court.....*Id.*

FRAUDULENT CONVEYANCES.

1. Where there is clearly a *bonâ fide* grantor, the grant is not one of those conveyances within the statutes against fraudulent conveyances. *Clarke* v. *White*.....178

2. W. purchased a lot of ground in the city of Washington, early in 1829, for $1532, on a credit of one, two and three years, and paid the notes at maturity; he took possession, immediately after the purchase, and commenced improving, by erecting buildings on it; on the 14th of January 1832, Smith, who had sold the land at the request of W., conveyed it to a trustee, for the benefit of the infant children of W. The improvements, before the deed, amounted in value to $3000, and after the deed $1200 or $1500; he failed in December, 1833; and the property was then worth about $6000; the deed of conveyance by Smith, was not recorded until within one day of the expiration of the time prescribed for recording such deed, by the statute of Maryland. Parties who made a composition of a large debt due to them by W., in which composition they sustained a loss of thirty per cent., knew at the time of the composition, of the conveyance of this property to the infant children of W., and of his large improvements on the same; and made the composition with this knowledge. The court refused to declare the agreement of composition void, because of this transaction.....*Id.*

GRANTS.

1. This court has uniformly held, that the term "grant" in a treaty, comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession; and that in the term "laws" is included custom and usage, when once settled; though it may be "comparatively of recent date, and is not one of those to the contrary of which the memory of a man runneth not, which contributed so much to make up the common-law code, which is so justly venerated." *Strother* v. *Lucas*.....*410

2. A grant may be made by a law, as well as a patent pursuant to a law; and a confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant de novo.....*Id.*

See FLORIDA LAND-CLAIMS: LOUISIANA AND FLORIDA TREATIES.

GRANTS IN LOUISIANA AND IN FLORIDA.

See FLORIDA LAND-CLAIMS: LOUISIANA AND FLORIDA TREATIES.

GUARANTEE.

1. Upon a letter of guarantee, addressed to a particular person, or to persons generally, for a future credit to be given to a party in whose favor the guarantee is drawn; to charge the guarantor, notice is necessarily to be given to him, that the person giving the credit has accepted or acted upon the guarantee, and has given credit on the faith of it. This is not an open question in the supreme court, after the decisions which have been made in Russell *v.* Clarke, 7 Cranch 69; Edmondston *v.* Drake, 5 Pet. 624; Douglass *v.* Reynolds, 7 Ibid. 113; and Lee *v.* Dick, 10 Ibid. 482. *Adams* v. *Jones*.....*207

2. The rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound, without notice, where the maker of the note was insolvent at its maturity; unless he can show he has sustained some prejudice by want of notice of a demand on the maker of the note, and notice of non-payment. *Reynolds* v. *Douglass*.....*497

3. If the guarantor could prove he had suffered damage by the neglect to make the demand on the maker of the note, and to give notice, he would only be discharged to the extent of the damage sustained.....*Id*

4. In order to enable the party claiming under a guarantee, to recover from the guarantor by a letter of credit, he must prove that notice of its acceptance had been given in a reasonable time after the letter of credit had been accepted; this notice need not be proved to have been given in writing, or in any particular form; but may be inferred by the jury from facts and circumstances which warrant such inference.....*Id.*
5. A recognition of the parties to a letter of credit, of their obligation to pay as guarantors, under a supposed liability, which did not arise from the facts of the case, and of which facts they were ignorant; would not be a waiver of the notice they were entitled to have of the acceptance of their guarantee.....*Id.*
6. A promise to pay a debt, by the guarantors, qualified with a condition, which was rejected, is not a waiver by the guarantor of his right to notice of the acceptance of their guarantee .....*Id.*
7. When the party in whose favor a letter of credit is given, afterwards becomes insolvent, and his insolvency is known to the guarantors; it is not necessary, in an action on the letter of credit, to prove that a demand of payment was made on the insolvent.....*Id.*

INSOLVENT LAWS.

See BAIL.

INSURANCE.

1. By the well-settled principles of law, in the United States, the state of the facts, and not the state of the information, at the time of the abandonment, constitutes the criterion by which is to be ascertained whether a total loss has occurred or not, for which an abandonment can be made. If the abandonment, when made, is good, the rights of the parties are definitively fixed; and do not become changed by any subsequent events; if, on the other hand, the abandonment, when made, is not good, subsequent circumstances will not affect it; so as retroactively to impart to it a validity which it had not at its origin. *Bradlie* v. *Maryland Insurance Co*.....*378
2. In cases where the abandonment is founded upon a supposed technical total loss, by a damage or injury exceeding one-half the value or the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proof, to be derived from subsequent events. Thus, if the repairs, when subsequently made, clearly exceed the half value, it is plain, that this affords one of the best proofs of the actual damage or injury; on the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. In many cases of stranding, the state of the vessel may be such, from the imminency of the peril, and the apparent cost of expenditures requisite to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril, without an actual expenditure of one-half of her value, after she is in safety. Where, in the circumstances in which the vessel then may have been, in the highest degree of probability, the expenditures to repair her would exceed half her value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold every attempt to get the vessel off, because of such apparently great expenditures; the abandonment would, doubtless, be good.....*Id.*
3. In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, on the fullest consideration, been held by the supreme court, that the true basis of the valuation is the value of the ship at the time of the disaster; and that if, after the damage is, or might be, repaired, the ship is not, or would not be, worth, at the place of repairs, double the cost of repairs, it is to be treated as a technical total loss.....*Id.*
4. The valuation in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one half of the value of the vessel, or not. For the like reason, the ordinary deduction in case of a partial loss of "one-third new for old," from the repairs, is equally inapplicable to cases of a technical total loss, by an injury exceeding one-half of the value of the vessel.....*Id.*
5. The mere retardation of the voyage, by any of the perils insured against, not amounting to, nor producing, a total incapacity of the ship eventually to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss, which will authorize an abandonment. A retardation, for the purpose of repairing damage from the perils insured against, that damage not exceeding one moiety of the value of the ship, falls directly within this doctrine; under such circumstances, if the ship can be repaired, and is repaired, and is thus capable of performing the voyage, there is no ground of abandonment, founded upon

the consideration, that the voyage may not be worth pursuing, for the interest of the ship-owner; or that the cargo has been injured so that it is not worth transporting further on the voyage; for the loss of the cargo for the voyage, has nothing to do with the insurance upon the ship for the voyage.....*Id.*

6. An insurance on time differs, as to this point, in no essential manner, from one upon a particular voyage; except in this, that in the latter case, the insurance is upon a specific voyage described in the policy; whereas, a policy on time insures no specific voyage, but it covers any voyage or voyages whatsoever, undertaken within, and not exceeding, in point of duration, the limited period for which the insurance is made. But it does not contain an undertaking that any particular voyage shall be performed, within a particular period; it warrants nothing as to any prolongation or retardation of the voyage; but only that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her during the time for which she is insured; and of repairing it, if interrupted.....*Id.*

7. There is no principle of law which makes the underwriters liable, in the case of a merely partial loss of the ship, if money is taken up on bottomry for the necessary repairs and expenditures; and which makes it the duty of the underwriters to deliver the ship from the bottomry bond, to the extent of their liability for the expenditures; and that if they do not, and if the vessel is sold under the bottomry bond, they are liable, not only for the partial loss, but for all other losses to the owner, for their neglect....*Id.*

8. The underwriters engage to pay the amount of the expenditures and losses directly flowing from the perils insured against; but not any remote or contingent losses to the owner, from their neglect to pay the same.....*Id.*

9. The underwriters are not bound to supply funds, in a foreign port, for the repairs of any damage to the ship, occasioned by a peril insured against; they undertake only to pay the amount, after due notice and proof of the loss, and within a prescribed time.....*Id.*

10. If, to meet the expenditures for repairs, the master is compelled to take up money on bottomry, and thereby an additional premium becomes payable, that constitutes a part of the loss for which the underwriters are liable; but in cases of partial loss, the money is not taken up on account of the underwriters, but of the owner; and they become liable for the loss, whether the bottomry bond ever becomes due and payable, or not.....*Id.*

11. In the case of a partial loss, where money is taken up on bottomry bond, to defray the expenditures of repairs, the underwriters have nothing to do with the bottomry bond; but are simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode, as a part of the loss.....*Id.*

JUDICIAL POWERS.

1. It is a sound principle, that in every well-organized government, the judicial powers should be co-extensive with the legislative; so far, at least, as they are to be enforced by judicial proceedings. *Kendall* v. *United States*.....*524

JURISDICTION.

1. The jurisdiction of the supreme court, in writs of error and appeals from the circuit court, is limited to cases where the sum in controversy exceeds $2000. Where, by a decree of the circuit court, on an application to have a judgment of the circuit court reformed, so as to expunge therefrom $1000, and if the decree of the circuit court, ordering the same, had been affirmed in the supreme court, the appellants would have been obliged to allow the deduction of $1000 from the judgment, with nineteen years' interest, amounting together to the sum of $2040: it was *held*, that the supreme court had jurisdiction of the appeal. *Bank of United States* v. *Daniels*.....*32

2. The demandant, a subject of the king of Great Britain, instituted an action, by writ of right, in the district court for the northern district of New York, against the defendant, a citizen of New York; in the declaration, there was no averment that the defendant was a citizen of New York. The defendant pleaded to the first count in the declaration, and demurred to the second and third counts; the demandant joined in the demurrer, and averred that the defendant was a citizen of New York; in the subsequent proceedings in the case in the district court, and afterwards in the supreme court, no exception was taken by the defendant, that there was no averment in the declaration, that the demandant was a citizen of the United States, nor until the case came a second time before the supreme court, to which it was now brought by a writ of error, prosecuted by the demandant in the writ of right. The defendant moved to dismiss the writ of error, for the want of an averment of

the citizenship of the defendant in the declaration. The court overruled the motion. *Bradstreet* v. *Thomas*.....*59

3. To give the supreme court of the United States jurisdiction, under the 25th section of the judiciary act, in a case brought from the highest court of a state, it must be apparent in the record, that the state court did decide in favor of the validity of a statute of the state the constitutionality of which was brought into question on the writ of error. Two things must be apparent in the record; first, that some one of the questions stated in the 25th section did arise in the state court; and secondly, that a decision was actually made thereon, by the same court, in the manner required by the section. *McKinney* v. *Carroll*.....*66

4. Indictment in the circuit court of the United States for the southern district of New York, for feloniously stealing a quantity of merchandise, belonging to the ship Bristol, the ship being in distress, and cast away on a shoal of the sea, on the coast of the state of New York; the indictment was founded on the 9th section of the act, entitled, "an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved 3d March 1825. The goods were taken above high-water mark, upon the beach, in the county of Queens, in the state of New York: *Held*, that the offence committed was within the jurisdiction of the circuit court. *United States* v. *Coombs*....72

5. In cases purely dependent upon the locality of the act done, the admiralty jurisdiction is limited to the sea, and to the tide-water as far as the tide flows. Mixed cases may arise, and often do arise, where the act and services done are of a mixed nature; as, where salvage services are performed, partly on tide waters and partly on shore, for the preservation of the property, in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage.....*Id.*

6. A bill was filed by W., a citizen of Connecticut, against M. and others, citizens of Rhode Island, to the circuit court of the United States for the district of Rhode Island; an answer was put into the bill, and the cause was referred to a master for an account; pending these proceedings, the complainant died, and administration of his effects was granted to C., a citizen of Rhode Island, who filed a bill of revivor in the circuit court. The laws of Rhode Island do not permit a person residing out of the state to take out administration of the effects of a deceased person within the state; and they make such administration indispensable to the prosecution and defence of any suit in the state, in right of the estate of the deceased: *Held*, that the bill of revivor was, in no just sense, an original suit, but was a mere continuation of the original suit, the parties to the original suit were citizens of different states, and the jurisdiction of the court completely attached to the controversy; having so attached, it could not be divested by any subsequent proceedings; and the circuit court of Rhode Island had rightful authority to proceed to its final determination. *Clarke* v. *Mathewson*.....*164

7. If, after the proper commencement of a suit in the circuit court, the plaintiff removes into, and becomes a citizen of, the same state with the defendant; the jurisdiction of the circuit court over the cause is not affected by such change of domicil.....*Id.*

8. The death of a party, pending a suit, does not, where the cause of action survives, amount to a determination of the suit. It might, in suits at common law, upon the mere principles of that law, have produced an abatement of the suit, which would have destroyed it; but in courts of equity, an abatement of the suit, by the death of the party, has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination, of the suit. It may again be put in motion by a bill of revivor; and the proceedings being revived, the court proceeds to its determination as on an original bill...*Id.*

9. In the 31st section of the judiciary act of 1789, congress manifestly treats the revivor of a suit, by or against the representatives of the deceased party, as a matter of right, and as a mere continuance of the original suit; without any distinction as to the citizenship of the representative, whether he belongs to the same state where the cause is depending, or to another state.....*Id.*

10. The supreme court has not jurisdiction of a case brought by a writ of error from the supreme court of the state of Missouri, under the 25th section of the judiciary act, where the question was whether the appellee was a slave. The provisions of the treaty by which Louisiana was ceded to the United States, and in which was a guarantee of the property of persons residing at the time of the cession, within the territory of Louisiana, may be enforced in the courts of the state of Missouri; the allegation that the treaty has been misconstrued by the supreme court of the state, in refusing to sanction the claim asserted, will not give the supreme court of the United States jurisdiction in the case. *Choteau* v. *Marguerite*.....*507

11. In the case of Crowell *v.* Randell, 10 Pet.

368, the court revised all the cases on jurisdiction under the 25th section of the judiciary act, and laid down the law as they wished it to be universally understood... *Id.*

12. No court can, in the ordinary administration of justice, in common-law proceedings, exercise jurisdiction over a party, unless he voluntarily appear, or be found within the jurisdiction of the court, so as to be served with process; such process cannot reach the party beyond the territorial jurisdiction of the court. This is a personal privilege, which may be waived by appearance; and if advantage is to be taken of it, it must be by plea, or some other mode, at an early stage of the cause. *Rhode Island* v. *Massachusetts*.....*657

13. Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them.... *Id.*

14. An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue; but when the objection goes to the power of the court over the parties, or the subject-matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill. *Id.*

15. In the case of Rhode Island *v.* Massachusetts, the court did not mean to put the jurisdiction of the supreme court on the ground, that jurisdiction was assumed in consequence of the state of Massachusetts having appeared in that cause; it was only intended to say, that the appearance of the state superseded the necessity of considering the question, whether any and what course would have been adopted by the court, if the state had not appeared; the court did not mean to be understood, that the state had concluded herself, on the ground that she had voluntarily appeared; or, that if she had not appeared, the court would not have assumed jurisdiction of the case. Being satisfied the court had jurisdiction of the subject-matter of the bill, so far at least as respected the question of boundary, all inquiry as to the mode and manner in which the state was to be brought into court, or what would be the course of proceeding, if the state declined to appear, became entirely unnecessary. *Massachusetts* ads. *Rhode Island*.....*757

LAND TITLES IN LOUISIANA AND MISSOURI.

1. The state of Missouri was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United states by the treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it; by which, this government put itself in place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants. Both were regulated by the law of nations, according to which, the rights of property are protected, even in the case of a conquered country; and held sacred and inviolable, when it is ceded by treaty, with or without any stipulation to such effect; and the laws, whether in writing, or evidenced by the usage and customs of the conquered or ceded country, continue in force, until altered by the new sovereign. *Strother* v. *Lucas*.....*410

2. No principle can be better established by the authority of the supreme court, than "that the acts of an officer, to whom a public duty is assigned by his king, within the sphere of that duty, are *primâ facie* taken to be within his power." "The principles on which it rests, are believed to be too deeply founded in law and reason, even to be successfully assailed; he who would controvert a grant, executed by the lawful authority, with all the solemnities required by law, takes on himself the burden of showing that the officer has transcended the powers conferred upon him; or that the transaction is tainted with fraud."..... *Id.*

3. Where the act of an officer to pass the title to land, according to the Spanish law, is done contrary to the written order of the king, produced at the trial, without any explanation; it will be presumed, that the power has not been exceeded; that the act was done on the motives set out therein; and according to some order known to the king and his officers, though not to his subjects; and courts ought to require very full proof, that he had transcended his powers, before they so determine it..... *Id.*

4. The unwritten law of Louisiana, before the cession of the territory to the United States..... *Id.*

5. In favor of long possession and ancient appropriation, everything which was done will be presumed to have been rightfully done; and though it do not appear to have been done, the law will presume that whatever was necessary has been done..... *Id.*

6. Regulations under the Spanish laws relative to town-lots and out-lots..... *Id.*

See LOUISIANA AND FLORIDA TREATIES.

LIMITATION OF ACTIONS.

1. No principle of law is better settled, than to bring a case within the exception of merchandise accounts between merchant and

merchant, in the statute of limitations, there must be an account; and that, an account open or current; that it must be a direct concern of trade; that liquidated demands on bills and notes, which are only traced up to the trade or merchandise, are too remote to come within this description. When the account is stated between the parties, or when anything has been done by them, which, by their implied admission, is equivalent to a settlement; it has then become an ascertained debt. Where there is a settled account, that becomes the cause of action, and not the original account; although it grew out of an account between merchant and merchant, their factors or servants. *Toland* v. *Sprague*.....*300

2. T. shipped a quantity of merchandise, by P., to Gibraltar, who, on arriving there, placed the goods in the hands of S., and received advances from S. upon them; in 1825, S. sold the goods and transmitted an account-sales, as of the merchandise received from P., to T., who received it in September 1825, stating the balance of the proceeds to be $2578. T., in 1825, wrote to S., directing him to remit the amount to him, deducting $1000, which had been advanced by S. on the goods, and which had been remitted by P. to T.; S. refused to make the remittance, alleging that P. was largely indebted to him. No suit was instituted by T. against S., until August 1834. The account was a stated account; and the statute of limitations applied to it..... *Id.*

3. The mere rendering an account does not make it a stated account; but if the other party receives it, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him, then it becomes a stated account. It is not at all important, that the account was not made out between the plaintiff and the defendant; the plaintiff having received it, having made no complaint as to the items or the balance; but, on the contrary, having claimed that balance, thereby adopted it, and by his own act treated it as a stated account..... *Id.*

4. T. shipped merchandise consigned to P., as supercargo; P. put the goods into the hands of S., a merchant of Gibraltar, as the merchandise of T., and received an advance upon them; S. having sold the merchandise, rendered an account of the sales, stating the sales to have been made by order of P., and crediting the proceeds in account with P. The account came into the hands of T., in 1825; and he claimed the balance of the proceeds from S., deducting the advance made by S. to P., and payment of the same was refused by P.: *Held*, that as T. had a right, in 1825, to call on S. to account, and as no suit was instituted against S. until 1834; S. having always denied his liability to T. for the amount of the sales, from the time of the demand; the statute of limitations was a bar to an action to recover the amount from S..... *Id.*

5. Courts of equity are no more exempt from obedience to statutes of limitations, than courts of common law. *Bank of United States* v. *Daniels*.....*32

6. The statute of limitations is a bar, in a case where, at the time of the return of a bill of exchange, payable in New Orleans, and drawn in Kentucky, protested for non-payment, the parties to it, in 1819, paid as damages on the bill, ten per centum on the amount; and did not, until 1827, claim that, by the law of Kentucky, no damages were payable on such a bill. In 1819, the parties to the bill paid $3330.67 on account of the bill for $10,000, the cost of protest and damages; and gave their note for $8000, for the balance of the bill, which was discounted, and the proceeds, by express agreement, applied to the payment of the bill. If no damages were payable on the bill for $10,000, an action to recover back the same, as included in the payment of the $3330.67, could have been instituted in 1829..... *Id.*

LOUISIANA AND FLORIDA TREATIES.

1. Congress, in order to guard against imposition, declared by the law of 1804, that all grants of land made by the Spanish authorities, in the territory west of the Perdido, after the date of the treaty of St. Ildefonso, should be null and void; excepting those to actual settlers, acquired before December 20th, 1803. *Garcia* v. *Lee*.....*511

2. The controversy in relation to the country lying between the Mississippi and the Perdido rivers, and the validity of the grants made by Spain in the disputed territory, after the cession of Louisiana to the United States were carefully examined and decided in the case of Foster *v.* Neilson. This court, in that case, decided, that the question of boundary between the United States and Spain was one for the political departments of the government; that the legislative and executive branches having decided the question, the courts of the United States were bound to regard the boundary determined by them as the true one; that grants made by the Spanish authorities, of lands which, according to this boundary line, belonged to the United States, gave no title to the grantees, in opposition to those claiming

under the United States; unless the Spanish grants were protected by the subsequent arrangements made between the two governments; and that no such arrangements were to be found in the treaty of 1819, by which Spain ceded the Floridas to the United States, according to the fair import of its words, and its true construction.....*Id.*

3. In the case of Foster *v.* Neilson, the supreme court said, that the Florida treaty of 1819 declares, that all grants made before the 24th January 1818, by the Spanish authorities, "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty;" and in deciding the case of Foster *v.* Neilson, the court held, that even if this stipulation applied to lands in the territory in question, yet the words used did not import a present confirmation, by virtue of the treaty itself, but that they were words of contract; "that the ratification and confirmation which were promised, must be the act of the legislature; and until such shall be passed, the court is not at liberty to disregard the existing laws on the subject." Afterwards, in the case of the United States *v.* Percheman, 7 Pet. 86, in reviewing the words of the eighth article of the treaty, the court, for the reasons there assigned, came to a different conclusion; and held, that the words were words of present confirmation, by the treaty, where the land had been rightfully granted, before the cession; and that it did not need the aid of an act of congress to ratify and confirm the grant. This language was, however, applied by the court, and was intended to apply, to grants made in a territory which belonged to Spain at the time of the grant; the case then before the court was one of that description; it was in relation to a grant of land in Florida, which unquestionably belonged to Spain, at the time the grant was made; and where the Spanish authorities had an undoubted right to grant, until the treaty of cession in 1819; it is of such grants, that the court speak, when they declare them to be confirmed and protected by the true construction of the treaty; and that they do not need the aid of an act of congress to ratify and confirm the title of the purchaser. The court do not apply this principle to grants made within the territory of Louisiana. The case of Foster *v.* Neilson must, in all other respects, be considered as affirmed by the case of Percheman; as it underwent a careful examination in that case, and as none of its principles were questioned, except that referred to.....*Id.*

4. The leading principle in the case of Foster *v.* Neilson, which declares, that the boundary line determined on as the true one by the political departments of the government, must be recognised as the true one by the judicial departments, was, after that case, directly acknowledged and affirmed by this court, in 1832, in the case of the United States *v.* Arredondo, 8 Pet. 711; and this decision was given by the court, with the same information before them as to the meaning of the Spanish side of the treaty, which is mentioned in the case of Percheman.....*Id.*

MANDAMUS.

1. The Court refused to award a *mandamus* to the district judge of the district of Louisiana, commanding him to sign a bill of exceptions tendered to him, and to command him to have inscribed, by the clerk of the court, in the order-book of the court, an order passed by him, in a case which was before him under a mandate from the supreme court of the United States, requiring him to do, and to have done, certain matters, to carry into effect the decree of the supreme court, in a case which had been brought before the court by appeal from the district of Louisiana. *Ex parte Story*.....*339

2. The statements contained in a petition addressed to the supreme court, asking for "a rule to show cause why a *mandamus*, in the nature of a writ of *procedendo*, should not be issued," not being verified by affidavit; they cannot, under the decisions and practice of the court, be considered. *Poultney* v. *City of La Fayette*.....*472

3. The circuit court of the United States for the district of Columbia, has a right to award a *mandamus* to the postmaster-general of the United States, requiring him to pass to the credit of certain contractors of the United States' mail, a sum found to be due to them by the solicitor of the treasury of the United States; the solicitor acting under the provisions of a special act of congress. Such a proceeding does not interfere, in any respect whatever, with the rights and duties of the executive; nor does it involve any conflict or powers between the executive and judicial departments of the government. The *mandamus* does not seek to direct or control the postmaster-general in the discharge of his official duty, partaking, in any respect, of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control. *Kendall* v. *United States*.....*524

4. The act required by the law to be done by

the postmaster-general was simply to credit S. & S. with the full amount of the award of the solicitor of the treasury; this was a precise, definite act, purely ministerial; and about which the postmaster-general had no discretion whatever. It was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of the court, pursuant to an order of the court, is an official act. There was no room for the exercise of discretion, official or otherwise; all that was shut out by the direct and positive command of the law; and the act required to be done was, in every just sense, a mere ministerial act.....*Id.*

5. The common law, as it was in force in Maryland, when the cession of the part of the state within the district of Columbia was made to the United States, remained in force in the district. The writ of *mandamus* which issued in this case, in the district court of the district of Columbia, must be considered as it was at common law, with respect to its object and purpose; and varying only in the form required by the different character of the government of the United States. It is a writ, in England, issuing out of the king's bench, in the name of the king, and is called a prerogative writ, but considered a writ of right; and is directed to some person, corporation, or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office, and which is supposed to be consonant to right and justice; and where there is no other adequate, specific remedy, such a writ, and for such a purpose, would seem to be peculiarly appropriate. The right claimed is just, and established by positive law; and the duty required to be performed is clear and specific; and there is no other adequate remedy.....*Id.*

6. The result of the cases of McIntire *v.* Wood, and McClung *v.* Silliman clearly is, that the authority to issue the writ of *mandamus* to an officer of the United States, commanding him to perform a specific act, required by a law of the United States, is within the scope of the judicial powers of the United States, under the constitution: but that the whole of that power has not been communicated by law to the circuit courts of the United States in the several states; it is a dormant power, not yet called into action and vested in those courts. There is nothing growing out of the official character of a party, that will exempt him from this writ, if the act to be performed is merely ministerial.....*Id.*

7. The power to issue the writ of *mandamus* is, in England, given to the king's bench only, as having the general supervising power over all inferior jurisdictions and officers, and is co-extensive with judicial power; and the same theory prevails in the state governments of the United States, where the common law is adopted, and governs in the administration of justice; the power of issuing this writ is generally confided to the highest court of original jurisdiction.....*Id.*

8. There can be no doubt, but that, in the state of Maryland, a writ of *mandamus* might be issued to an executive officer, commanding him to perform a ministerial act required of him by the laws; and, if it would lie in that state, there can be no good reason why it should not lie in the district of Columbia, in analogous cases.....*Id.*

9. The powers of the supreme court of the United States and of the circuit courts of the United States, to issue writs of *mandamus*, granted by the 14th section of the judiciary act of 1788, is only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed; the *mandamus* does not direct the inferior court how to proceed, but only that it must proceed according to its own judgment, to a final determination; otherwise, it cannot be reviewed in the appellate court. It is different in the circuit court of the district of Columbia, under the adoption of the laws of Maryland, which included the common law.....*Id.*

10. The cases of McIntire *v.* Wood, 7 Cranch 504; and McClung *v.* Silliman, 6 Wheat. 598, have decided that the circuit courts of the United States, in the several states, have no power to issue a *mandamus* against one of the officers of the United States.....*Id.*

11. The power of the circuit court of the district of Columbia, to exercise the jurisdiction to issue a writ of *mandamus* to a public officer, to do an act required of him by law, results from the 3d section of the act of congress, of February 27th, 1801, which declares that the court and the judges thereof shall have all the power by law vested in the circuit courts of the United States. The circuit courts referred to, were those established by the act of February 13th, 1801; the repeal of that law, fifteen months afterwards, and after the circuit court for this district had been organized, and had gone into operation, under the act of 27th February 1801, could not, in any manner, affect that law any further than was provided by the repealing act.....*Id.*

MANDATE.

1. The supreme court is bound to grant a mandate to the inferior court, which will suit the case. *Ex parte Sibbald*.....*488

2 Where the mandate which has been issued by the clerk of the supreme court, to the inferior court, was not an execution of the final decree of the court in the case; at a subsequent term of the court, on its being shown that the decree of the court in the case in which it had been issued, had not been executed, the clerk was ordered to make out a certificate of the final decree of the court before rendered, and a mandate according to the final decree and the opinion of the court, on a petition filed; stating that the decree of the court was not executed by reason of an imperfection in the first mandate ..... *Id.*

3. Where the supreme court have executed their power, in a case before them, and their final decree or judgment required some further act to be done, it cannot issue an execution, but will send a special mandate to the court below to award it. Whatever was before the court, and is disposed of, is considered finally settled ..... *Id.*

4. The inferior court is bound by the decree, as the law of the case, and must carry it into execution according to the mandate; they can examine it for no other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, fore rror apparent; nor intermeddle with it further than to settle so much as has been remanded..... ....*Id.*

5. After a mandate, no rehearing will be granted; and on a subsequent appeal, nothing is brought up but the proceedings subsequent to the mandate..... .....*Id.*

6. If the special mandate directed by the 24th section of the judiciary act is not obeyed, then the general power given to "all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," by the 14th section of the judiciary act, fairly arises; and a *mandamus* or other appropriate writ, will go..... .....*Id.*

7. At the time when a decree was made in the district court of Louisiana, in a case before it, the complainant was dead; the executrix was afterwards admitted by the district court to become a party to the suit, and prosecuted an appeal to the supreme court, where the decree of the district court was reversed on the merits; and the case was sent back to the district court on a mandate, requiring the decree of a supreme court to be carried into effect. The decease of the plaintiff, before the decree, and his having left other heirs besides the executrix, were offered, in the form of a supplement answer to the original bill, to the district court, when acting under the mandate of the supreme court, to show error in the proceedings of that court, with a view to bring the case again before the supreme court, in order to have a re-examination and a reversal of the decree of that court; the district court refused to permit the evidence of the matters alleged to be entered on the records of the court, or to sign a bill of exceptions, stating that the same had been offered. The court, in the case of Skillern's Executors *v.* May's Executors, 6 Cranch 267, said: "as it appeared that the merits of the case had been finally decided in this court, and that its mandate required only the execution of the decree, the circuit court was bound to carry that decree into execution, although the jurisdiction of the court was not alleged in the pleadings." In the case now before the court, the merits of the controversy were finally decided by this court, and its mandate to the district court required only the execution of the decree. On the authority of this case, the refusal to allow the defendant to file a supplemental answer and plea, was sustained. *Ex parte Story.**339

NUISANCE.

1. The Potomac river is a navigable stream or part of the *jus publicum;* and any obstruction to its navigation would, upon the most established principles, be a public nuisance. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law, is by indictment or information, by which the nuisance may be abated, and the person who caused it may be punished. A court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney-general. If any particular individual have sustained special damage from the erection from it, he may maintain a private action for such special damage; because to that extent, he has suffered beyond his portion of injury, in common with the community at large. *Georgetown* v. *Alexandria Canal Co.*...*91

See CHANCERY AND CHANCERY PRACTICE.

PARENT AND CHILD.

1. The complainants, as the ground to invalidate a deed made by a daughter, of twenty-three years of age, to her father, by which she conveyed the estate of her deceased mother to her father, he having a life-estate, as tenant by the curtesy, in the same; asserted, that such a deed ought, upon considerations of public policy, growing out of the relations of the parties, to be deemed

void. We do not deem it necessary to travel over all the English authorities which have been cited; we have looked into the leading cases, and cannot discover anything to warrant the broad and unqualified doctrine asserted; all the cases are accompained with some ingredient, showing undue influence exercised by the parent, operating on the fears or hopes of the child; and sufficient to show reasonable grounds to presume, that the act was not perfectly free and voluntary, on the part of the child; and in some cases, although there may be circumstances tending, in some small degree, to show undue influence; yet, if the agreement appears reasonable, it has been considered enough to outweigh slight circumstances, so as not to affect the validity of the deed. It becomes less necessary for the court to go into a critical examination of the English chancery doctrine on this subject; for, should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle, that the deed of a child to a parent, is to be deemed *primâ facie*, void. *Jenkins* v. *Pye*.....*241

2. To consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is opening a principle at war with all filial, as well as parental, duty and affection; and acting on the presumption that a parent, instead of wishing to promote his interest and welfare, would be seeking to overreach and defraud his child; whereas, the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. Such a presumption harmonizes with the moral obligations of a parent to provide for his child; and is founded upon the same benign principle that governs cases of purchases made by parents, in the name of a child; the natural and reasonable presumption in all transactions of this kind is, that a benefit was intended the child, because in the discharge of a moral and parental duty.....*Id.*

3. In the year 1813, a daughter, twenty-three years old, conveyed all her remainder in the real estate which had belonged to her mother, to her father, for a nominal consideration; she married two years afterwards, and died in 1818; no complaint of the transaction was made in the lifetime of the daughter, nor during the lifetime of the father, who died in 1831. Lapse of time, and the death of the parties to a deed, have always been considered, in a court of chancery, entitled to great weight, and almost controlling circumstances, in cases of this kind.....*Id.*

PARTNERSHIP.

1. The funds of a partnership cannot be rightfully appli d by one of the partners to the discharge of his own separate pre existing debts, without the express or implied assent of the other parties; and it maks no difference in such a case, that the separate creditor had no knowledge, at the time, of the fact of the fund being partnership property. *Rogers* v. *Batchelor*.....*217.

2. Whatever acts are done by any partner, in regard to partnership property or contracts, beyond the scope and objects of the partnership, must, in general, to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner.....*Id.*

3. The authority of each partner to dispose of the partnership funds, strictly and rightfully extends only to the business and transactions of the partnership itself; and any disposition of those funds, by any partner, beyond such purpose, is an excess of his authority as partner; and a misappropriation of those funds, for which the partner is responsible to the partnership; though in the case of *bonâ fide* purchasers, without notice, for a valuable consideration, the partnership may be bound by the acts of one partner.....*Id.*

4. If one partner write a letter, in his own name, to his creditor, referring to the concerns of the partnership, and his own private debts to those to whom the letter is addressed; the letter not being written in the name of the firm, it cannot be presumed, that the other partner had a knowledge of the contents of the letter, and sanctioned them; unless some proof of this effect was given, the other partner ought not to be bound by the contents of the letter.....*Id.*

PATENTS FOR LANDS.

1. A patent for lands, issued after the decease of the patentee, passes no title to the lands; there must be a grantee, before the grant can take effect. *Galloway* v. *Finley*. *264

2. The acts of congress of 1807, and the subsequent acts relative to the titles to military lands, were intended to remedy any defects in the patenting the lands in the name of the warrantee, who might have been deceased at the time of the emanation of the patent; and to secure the title to the lands to the heirs of the patentee. The statute is general, including by name all grants, not distinguish.

ing between void and valid; and the plainest rules of propriety and justice require, that the courts should not introduce an exception, the legislature having made none.....*Id.*

PLEAS AND PLEADING.

1. The effect and nature of an averment in a plea put in by a defendant, when it is not essential to the plea. *Toland* v. *Sprague.**300

POSTMASTER-GENERAL.

See MANDAMUS.

POTOMAC RIVER.

1. The Potomac river is a navigable stream, or part of the *jus publicum;* and any obstruction to its navigation would, upon the most established principles, be a public nuisance. *Georgetown* v. *Alexandria Canal Co.*...*91

See COMPACTS BETWEEN STATES.

PRACTICE.

1. Where one of three parties, plaintiffs in a writ of error, dies, after the writ of error is issued, it is not necessary to make the heirs and representatives of the deceased, parties to the writ of error; as the cause of action survives to the other two plaintiffs in error. *McKinney* v. *Carroll*.....*66
2. The court refused to allow ten per centum per annum interest, as damages for suing out a writ of error on the amount of the judgment in the circuit court, under the 17th rule of the court, in a case in which the construction of a statute of the state of Georgia was involved; and also questions relative to proofs of the handwriting of the maker of promissory notes. The case was not considered as one where the writ of error was sued out merely for delay. *McNeil* v. *Holbrook.**84
3. A defendant in an appeal, using the copy of the record received from the circuit court lodged by the appellant, cannot have the appeal docketed and dismissed, under the 30th rule of the court; on the ground, that the appellant has failed to comply with the 37th rule, which requires a bond to be given to the clerk of the supreme court, before the case is docketed. He must, to sustain a motion to dismiss the cause, produce the certificate of the circuit court, stating the cause; and certifying that such an appeal has been duly sued out and allowed. *West* v. *Brashier*.....*101
4. The practice seems to be well settled, that in suits against a state, if the state shall neglect to appear, on due service of process, no coercive measures will be taken to compel appearance; but the complainant will be allowed to proceed *ex parte*. *Massachusetts* ads. *Rhode Island*.....*757

See MANDAMUS: WRIT OF ERROR.

PRESIDENT.

1. To contend, that the obligations imposed on the president to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the constitution, and is entirely inadmissible. *Kendall* v. *United States*.....*524
2. Congress, by a special act passed for the purpose, directed the accounts of certain mail contractors to be referred to the solicitor of the treasury, and that the amount found by the solicitor to be due to the contractors should be passed to their credit, by the postmaster-general of the United States. The postmaster-general refused to allow to the credit of the mail contractors, the whole sum found to be due to them by the solicitor of the treasury, and a *mandamus* was asked from the circuit court of the district of Columbia, to the directed to the postmaster-general, commanding him to conform to the act of congress, and the report of the solicitor of the treasury. In opposition to the prayer for the *mandamus*, it was urged, that the postmaster-general was alone subject to the direction of the president of the United States, with respect to the execution of the duty imposed on him by the law under which the solicitor of the treasury acted; and this right of the president was claimed as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This doctrine cannot receive the sanction of this court; it would be vesting in the president a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which if carried out in its results, to all cases falling within it, would be clothing the president with a power to control the legislation of congress and paralyze the administration of justice.....*Id.*

PRIORITY OF THE UNITED STATES.

1. An attachment at the suit at the Farmers' Bank of Delaware, was issued against the effects of the Elkton Bank, on the 24th of September 1830, and under it were attached the funds of the Elkton Bank in the hands of one of its debtors; on the 8th day of July

1831, an attachment was issued, at the suit of the United States, the United States being creditors of the Elkton Bank, and it was laid on the same funds which had been previously attached at the suit of the Farmers' Bank of Delaware. The money thus attached by the Farmers' Bank of Delaware, in the hands of a debtor to the Elkton Bank, by legal process, before the issuing of the attachment in behalf of the United States, was bound for the debt for which it was first legally attached, by a writ in the nature of an execution; and the right of a private creditor, thus acquired, could not be defeated by the process subsequently issued at the suit of the United States. If the district court of the United States has a right to appoint receivers of the property of an insolvent bank which is indebted to the United States, for the purpose of having the property of the bank collected and paid over to satisfy the debt due to the United States by the bank; this would not be a transfer and possession of the property of the bank, within the meaning of the act of congress; and the right of the United States to a priority of payment, would not have attached to the funds of the bank. *Beaston* v. *Bank of United States*.....*102

2. From the language of the fifth section of the act of congress of March 3d, 1797, giving a priority to debts due to the United States, and the construction given to it by the supreme court, those rules are clearly established. 1st. That no lien is created by the statute. 2d. The priority established can never attach, while the debtor continues the owner, and in possession of the property, although he may be unable to pay his debts. 3d. No evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section. 4th. Whenever the debtor is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay the debt first, out of the proceeds of the debtor's property.....*Id.*

3. All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the act of congress. It is manifest, that congress intended to give priority of payment to the United States over all other creditors, in the cases stated therein; it, therefore, lies upon those who claim exemption from the operation of the statute, to show that they are not within its provisions.....*Id.*

4. Corporations are to be deemed and considered persons, within the provisions of the fifth section of the act of congress of 1797, and the priority of the United States exists as to debts due by them to the United States.....*Id.*

5. The legislature of Maryland passed an act, authorizing the stockholders of the Elkton Bank to elect trustees, who were to take possession of the funds and property of the bank, for the purposes of discharging the debts of the bank, and distributing the residue of the funds, which might be collected by them, among the stockholders. This, had the law been carried into effect, was not such an assignment of all the property of the bank as would entitle the United States to a priority of payment out of the funds of the bank.....*Id.*

6. No one can be divested of his property, by any mode of conveyance, statutory or otherwise, unless, at the same time, and by the same conveyance, the grantee becomes invested with the title. The moment the transfer of property takes place, the person taking it, whether by voluntary assignment, or by operation of law, becomes, under the statute, bound to the United States for the faithful performance of the trust....*Id.*

RECORDING OF DEEDS.

1. By the common law, a deed of land is valid, without registration; and where registry acts require deeds to be recorded, they are valid, until the time prescribed by the statute has expired; and, if recorded within the time, are as effectual from the date of execution, as if no registry act existed. *Clarke* v. *White*.....*178

SHERIFF'S SALE.

1. It is clear, that a purchaser at a sheriff's sale cannot protect himself against a prior claim, of which he had no notice; or be held a *bonâ fide* purchaser, unless he shall have paid the money. *Swayze* v. *Burke*.....*11

SPECIFIC PERFORMANCE.

1. The doctrine of a court of chancery, in cases for specific performance, has reference, ordinarily, to executory agreements for the conveyance of lands; and is rarely applied to contracts affecting personal property; where the relief prayed for in a bill, is the delivery to the complainant of instruments to which he is entitled, and not the execution of an executory contract, any further than to decree the amount the complainant has been

compelled to pay against the terms of the contract, chancery has jurisdiction of the cause; and the court will end the cause, without sending the parties to law as to part, having granted relief for part. *Clarke* v. *White*.....*178

STATUTE LAW.

1 It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes; and this has been the course by legislation in congress, in many instances, when state practice and state process has been adopted. Such adoption has always been considered as referring to the law existing at the time of adoption, and no subsequent legislation has ever been supposed to affect it; and such must, necessarily, be the effect and operation of such adoption. *Kendall* v. *United States*.....*524

STATES.

See APPEARANCE: BOUNDARIES OF STATES: CONSTITUTIONAL LAW: JURISDICTION.

SUPREME COURT.

1. The supreme court has jurisdiction of a bill filed by the state of Rhode Island against the state of Massachusetts, to ascertain and establish the northern boundary between the states, that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs; and they be quieted in the enjoyment thereof, and their title; and for other and further relief. *Rhode Island* v. *Massachusetts*.....*657

2 The supreme court is one of limited and special original jurisdiction; its action must be confined to the particular cases, controversies and parties, over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed is *coram non judice*, and its action a nullity. And whether the want or excess of power is objected by a party, or is apparent to the court, it must surcease its action, or proceed extra-judicially.....*Id.*

3. The several states of the United States, in their highest sovereign capacity, in the convention of the people thereof, on whom, by the revolution, the prerogative of the crown and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority, adopted the constitution; by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution, it was ordained, that this judicial power, in cases where a state was a party, should be exercised by the supreme court, as one of original jurisdiction; the states waived their exemption from judicial power, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases; but which they would not grant to any inferior tribunal. By this grant, the supreme court acquired jurisdiction over the parties in this cause, by their own consent and delegated authority, as their agent for executing the judicial power of the United States in the cases specified; Massachusetts has appeared, submitted to the process, in her legislative capacity, and pleaded, in bar of the plaintiff's action, certain matters on which the judgment of the court is asked. All doubts as to jurisdiction over the parties are thus at rest, as well by the grant of power by the people, as the submission of the legislature to the process; and calling on the court to exercise its jurisdiction on the case presented by the bill, plea and answer.....*Id.*

TREATIES.

See LOUISIANA AND FLORIDA TREATIES.

WRIT OF ERROR.

1. Where one of three parties, plaintiffs in a writ of error, dies, after the writ of error is issued, it is not necessary to make the heirs and representatives of the deceased, parties to the writ of error; as the cause of action survives to the two other plaintiffs in error. *McKenney* v. *Carroll*.....*66

2. In certain proceedings for the sale of property mortgaged, the widow and children of the deceased owner of the property were made defendants; the district court of Louisiana gave a judgment in favor of the plaintiffs. The widow was entitled to her community in the property mortgaged, and had taken the property, at the appraisement and estimation. The writ of error to the district court of Louisiana was issued in the name of "The heirs of Nicholas Wilson," without naming any person as plaintiff; the widow of Nicholas Wilson did not join in the writ of error. The writ of error was dismissed on the two grounds, that no person was named in it; and that the widow of Nicholas Wilson had not joined in it. *Wilson* v. *Life and Fire Insurance Co*.....*140

3. The rule of court is, that where there is a substantial defect in the appeal, or writ

of error, the objection may be taken at any time before the judgment; on the ground, that the case is not legally before the court, and that it has not jurisdiction to try it.....*Id.*

4. The judiciary act of 1789 authorizes the supreme court to issue writs of error, to bring up final judgments or decrees in a civil action, &c. The decision of the circuit court upon a rule or motion is not of that charac ter; such decisions are not final judgments. *Toland* v. *Sprague*.... .....*300

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